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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JURISDICTIONAL STATEMENT FILED, JANUARY 26, 1973

CONSIDERATION OF THE QUESTION OF JURISDICTION POSTPONED TO THE HEARING ON THE MERITS, MARCH 19, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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Relevant Docket Entries

DATE	PROCEEDINGS
8-30-72	Complaint filed.
	Motion for Preliminary Injunction filed.
	Memorandum in Support of Preliminary Injunction filed.
	Motion to Convene Three-Judge District Court.
	Memorandum in Support of Motion to Convene Three-Judge District Court.
	Certificate of Service filed indicating service upon Atty. Gen. of Indiana.
9-1-72	Order entered: George N. Beamer now withdraws from the consideration of this case because of his inability to handle the case on an emergency basis. I have reservations to leave on vacation on Saturday, September 2, 1972, which cannot be cancelled without giving up completely a vacation during 1972 and have matters that must be disposed of before I leave prevent me from hearing this matter during the afternoon of September 1, 1972. (SE) Beamer: J (copies to counsel)
9/5/72	Plaintiffs file motion for temporary restraining order. Cert. of ser. MB
9/8/72	Amended Complaint filed with cer. of ser.
9-7-72	Chief Judge Luther M. Swygert enters order designating Three Judge Panel. Panel composed of Honorable Robert A. Sprecher, Honorable James E. Noland and Honorable Jesse E. Eschbach, mb

Relevant Docket Entries

DATE	PROCEEDINGS
9-11-72	Theodore L. Sendak, Atty. Gen. of Ind. enters appearance by Thomas Neal and Edward W. Johnson for deft. Cert. of serv. MB
9-11-72	Memorandum and order entered. (SE) Eschbach. Pltf's motion for temporary restraining order is denied; provided, however, defts. are ordered and directed to file written showing within 7 days reflecting last date upon which ballots may be printed for general election. Copy to Wm. Rastetter and Thomas Neal and Edward W. Johnson 9-11-72. MB
9-13-72	Notice on hearing on motion for preliminary injunction set for 10:00 a.m., September 28, 1972 at Hammond mailed to R. Davy Eaglesfield, Robert Justice, William Rastetter, Thomas Neal and Edward W. Johnson 9-13-72. MB
9/21/72	Pursuant to pltfs' second motion for temporary restraining order filed this date, court enters order. (SE) Eschbach: Judge. Motion is denied. Copies to R. Davy Eaglesfield, Robert Justice, Wm. Rastetter; and Edward W. Johnson 9/22/72. js
9-25-72	Parties file Stipulation of Facts. (copies to Judge Robert A. Sprecher, Judge James E. Noland and Judge Jesse E. Eschbach)
9-21-72	Pltfs. file motion for temporary restraining order. Affidavit, memo in support and proof of service attached. MB

Relevant Docket Entries

DATE	PROCEEDINGS
9-28-72	Defendants file Motion to Dismiss with Memorandum thereon and certificate of service attached thereto.
9/28/72	Defts. file Answer to Amended Complaint. (copies distributed to all 3 judges this day.)
9-28-72	Pltf. appears by counsel Wm. Rastetter. Defts. represented by counsel Thomas Neal, Elizabeth Hamacher and Ed. Johnson, 72 H 224; 72 H 230 and 72 H 245 are consolidated for trial on merits. Cause submitted to the Court for hearing on defts' motion to dismiss. Argus. hrd. Mo. denied. Cause submitted to Ct. for hearing on merits. Pltf. waives opening statement. Defts present opening statement. Pltf. presents evidence, concludes and rests. Defts' present evidence, conclude and rest. Court finds that the loyalty oath contained in Ind. Ann. Stat. 29-3812 is severable in that the first portion is constitutional and the second segment is unconstitutional. The court further finds the defts. are ordered and directed to accept from the Communist Party of Indiana, an oath consistent with this opinion at any time prior to 2:00 p.m. on Friday, 9-29-72. (SE) SPRECHER, NOLAND & ESCHBACH. (copies to all counsel of record and all Judges)
10/3/72	Pltf. files petition for Mandate to enforce the prior order of the Court. Cert. of ser. and affidavit attached. MB

Relevant Docket Entries

DATE	PROCEEDINGS
10/3/72	Defts. file verified motion to reconsider and for stay. Cert. of serv. MB
10/4/72	Pursuant to Petition for Mandate and Motion to reconsider and for stay filed 10/3/72, order entered. (SE) Eschbach. The issue raised by the defendants' motion to reconsider is moot and does not require further ruling by this court. Petition for mandate by plaintiffs is denied. The State Election Board acted in accordance with the precise wording of this court's order of Sept. 28, 1972. Copy to Thomas Neal, Elizabeth Hamacher, Ed Johnson, R. Davy Eaglesfield, Robert Justice and William Rastetter 10/4/72. MB
10/11/72	Summons returned served on Thurman D. Moss by serving Wayne Davis on 9/6/72. (4.00)
10/11/72	Summons returned served on Indiana State Election Board by serving Wayne Davis on 9/6/72. (4.00)
10/11/72	Summons returned served on Hon. Edgar D. Whitcomb by serving his secretary Evelyn Hauser on 9/6/72. (4.00)
10/11/72	Summons returned served on Karl J. Stipher by serving Wayne Davis on 9/6/72. (4.00)
10/10/72	Pltfs. file Motion to Amend with cer. of ser. (all copies forwarded to Judge Eschbach via Mrs. Green's instructions and they will distribute copies to other Judges)

Relevant Docket Entries

DATE	PROCEEDINGS
10/10/72	Pltfs. file Notice of Appeal (Appeal due: Mon., Nov. 20, 1972) Clerk's Certificate issued. (copies to all counsel and Judges)
10-17-72	Plaintiffs file Motion to Withdraw Notice of Appeal with certificate of service thereon. (copies to all Judges)
10/30/72	Order entered. (SE) Eschbach. Pursuant to motion to leave to withdraw Notice of Appeal, the Notice of Appeal is now withdrawn. Pursuant to motion to amend the memorandum and order issued Sept. 28, the motion is denied. Order entered pursuant to the authority and vote of the entire panel. Copy to William Rastetter and Thomas Neal 11/1/72. MB
11-16-72	Defts. file Notice of Appeal with p.s. Clerk's Cert. issued and distributed.
11/29/72	Pltfs. file Notice of Appeal. Clerk's certificate issued. (copies of cert. and appeal forwarded to counsel) Ex. 3 Judges (counsel notified that $5.00 appeal fee is due.) —pd
3/26/73	Order from Supreme Court of the United States: The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.
3/26/73	Indiana Civil Liberties Union files Designation of Record to be forwarded to Supreme Court.

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Affidavit of Mike Bayer in Support of Motion for Temporary Restraining Order

MIKE BAYER, being duly sworn upon his oath, deposes and says:

1. That on August 31, 1972, at approximately 11:00 A.M., affiant went to the office of Governor Edgar D. Whitcomb pursuant to Burns IND. ANN. STAT. §§ 29-3801 *et seq.* for the purpose of submitting 1,634 petitions containing 12,193 signatures in support of the attempt of the Communist Party to secure a place on the ballot for electors pledged to Gus Hall and Jarvis Tyner, the candidates of the Communist Party.

2. That affiant personally tendered the petitions to William Lloyd, administrative assistant to and representative of Edgar D. Whitcomb, Governor of the State of Indiana.

3. That Mr. Lloyd informed affiant that he would not accept the petitions on behalf of the Governor.

4. That Mr. Lloyd informed affiant that the Governor would not certify the petitions as legal petitions.

5. That Mr. Lloyd stated that the basis for his action was Burns IND. ANN. STAT. § 29-3812 and Attorney General Opinion No. 11.

6. That while Mr. Lloyd said he would allow affiant to leave the petitions at the Governor's office since it was a public office, he would not give affiant a receipt for them.

Affidavit of Mike Bayer in Support of Motion

7. That in view of the above-mentioned facts, affiant did not leave the petitions at the office.

8. That affiant is prepared to again tender the petitions at any time.

MIKE BAYER

Subscribed and sworn to before me this 31st day of August, 1972.

PAULETTE E. CLARK
Notary Public

My Commission Expires:
4-13-76

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Affidavit of Simon Boorda in Support of Motion for Temporary Restraining Order

SIMON BOORDA, being duly sworn upon his oath, deposes and says:

1. That on August 31, 1972, at approximately 11:00 A.M., affiant went to the office of Governor Edgar D. Whitcomb pursuant to Burns IND. ANN. STAT. §§ 29-3801 *et seq.* for the purpose of submitting 1,634 petitions containing 12,193 signatures in support of the attempt of the Communist Party to secure a place on the ballot for electors pledged to Gus Hall and Jarvis Tyner, the candidates of the Communist Party.

2. That affiant personally tendered the petitions to William Lloyd, administrative assistant to and representative of Edgar D. Whitcomb, Governor of the State of Indiana.

3. That Mr. Lloyd informed affiant that he would not accept the petitions on behalf of the Governor.

4. That Mr. Lloyd informed affiant that the Governor would not certify the petitions as legal petitions.

5. That Mr. Lloyd stated that the basis for his action was Burns IND. ANN. STAT. § 29-3812 and Attorney General Opinion No. 11.

6. That while Mr. Lloyd said he would allow affiant to leave the petitions at the Governor's office since it was a public office, he would not give affiant a receipt for them.

Affidavit of Simon Boorda in Support of Motion

7. That in view of the above-mentioned facts, affiant did not leave the petitions at the office.

8. That affiant is prepared to again tender the petitions at any time.

SIMON BOORDA

Subscribed and sworn to before me this 31st day of August, 1972.

PAULETTE E. CLARK
Notary Public

My Commission Expires:
4-13-76

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Amended Complaint

[CAPTION OMITTED]

1. This is an action challenging the constitutionality of *Ind. Ann. Stat.* §29-3812 (1969) which compels an existing or newly organized political party to have its officers file an unconstitutional affidavit with the Indiana State Election Board in order for such party to have its candidates' names appear on the ballot for any election.

2. This action is brought under Title 42 USC §1983 and jurisdiction is invoked pursuant to Title 28, USC §§1331, 1343, 2201, 2202, 2281 and 2284. The amount in controversy exceeds $10,000.

3. Plaintiff Communist Party of Indiana, an unincorporated voluntary association having its principal office in South Bend, Indiana, is the Indiana Division of the Com-

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munist Party of the United States, a national party, and seeks recognition as a new political party pursuant to *Ind. Ann. Stat.* §§29-3801 et seq. (1972 Supp.). It has never run candidates in Indiana who have received one-half of one percent (½%) of the total vote of the state of all parties at the last preceding general election.

4. Plaintiff Gus Hall, a resident of the State of New York, is the candidate of the Communist Party of the United States for the office of President of the United States at the 1972 general election. Plaintiff Jarvis Tyner, a resident

of the State of New York, is the candidate of the Communist Party of the United States for the office of Vice President of the United States at the 1972 general election.

5. The following plaintiffs are candidates of plaintiff Communist Party of Indiana for the office of electors for President and Vice President of the United States at the 1972 general election:

Michael T. Bayer	5751 East 6th Avenue, Gary, Indiana for PRESIDENTIAL ELECTOR
Carol Boner	827 East 46th Street, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Simon Boorda	533 North Blaine, South Bend, Indiana for PRESIDENTIAL ELECTOR
Viola Dawning	512 South Williams, South Bend, Indiana for PRESIDENTIAL ELECTOR
Pearl Dawning	512 South Williams, South Bend, Indiana for PRESIDENTIAL ELECTOR
Richard Leuchtag	4723 Hinesley Avenue, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Daniel Mack	7608 Linden Avenue, Hammond, Indiana for PRESIDENTIAL ELECTOR

Robert W. Mentzer	1701 Lincoln Way West, Mishawaka, Indiana for PRESIDENTIAL ELECTOR
	. [47]
Jerry Paar	1218 North Elmer, South Bend, Indiana for PRESIDENTIAL ELECTOR
James W. Perkins	1811 North Delaware, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Jesse Reese	2376 Washington Street, Gary, Indiana for PRESIDENTIAL ELECTOR
Curtis Robinson	1125 West Thomas Street, South Bend, Indiana for PRESIDENTIAL ELECTOR
Naomi L. Siskind	5225 Cornelius Avenue, Indianapolis, Indiana for PRESIDENTIAL ELECTOR

6. Plaintiff Ruth Norrick, a United States citizen and resident of Lake County, Indiana, is a duly registered voter who desires plaintiff Communist Party of Indiana and its candidates to appear on the ballot at the 1972 general election and desires to vote for them. Plaintiff Norrick has been deprived of her fundamental constitutional right to have the opportunity to vote for the plaintiffs' candidates for electors for President and Vice President of the United States at the 1972 general election by the unlawful

conduct of the defendants which is described later in this complaint. She sues on her own behalf and on behalf of all members of her class who are similarly situated. The number of members of her class is so numerous that joinder is impractical. The question of law and fact in this action are common to the class, and plaintiff will fairly and adequately represent the interests of the entire class.

7. The defendants are Edgar D. Whitcomb, individually and as Governor of the State of Indiana; Karl J. Stipher, individually and as a member of the Indiana State Election Board; and Thurman De Moss, individually and as a member of the Indiana State Election Board. Defendants com- [48]
pose the Indiana State Election Board. Defendant Whitcomb is chairman of that Board. The defendants, in their collective official capacity as the Indiana State Election Board, certify *inter alia* the names of all candidates to appear on the ballot for the 1972 general election pursuant to *Ind. Ann. Stat.* §§29-3801 et seq. (1972 Supp.).

8. On or about September 1, 1972, plaintiff Communist Party of Indiana, desiring to establish itself as a new political party throughout Indiana pursuant to *Ind. Ann. Stat.* §§29-3801 and to have its candidates placed on the ballots throughout the State of Indiana for the 1972 general election. Such candidates are lawfully qualified to hold the office for which each is a candidate.

9. In furtherance of the above stated goals plaintiff Communist Party of Indiana, on or about April 15, 1972, ordered new party petitions to be printed on its own behalf

and on behalf of plaintiff candidates for circulation to Indiana voters to gather signatures to qualify it as a newly organized political party and to enable plaintiff candidates to have their names appear on the 1972 general election ballot as required by *Ind. Ann. Stat.* §§29-3801 et seq. These petitions were received from the printer on April 29, 1972.

10. On or about May 1, 1972, plaintiff Communist Party of Indiana began to circulate its petitions to gather the [49] requisite signatures to qualify it as a newly organized political party and its candidates for listing on the ballot pursuant to *Ind. Ann. Stat.* §§29-3801 et seq.

11. On August 31, 1972 representatives of plaintiff Communist Party of Indiana went to the office of defendant Whitcomb for the purpose of submitting petitions required by §§29-3801 et seq.; said petitions numbered over 1600 and contained over 12,000 signatures of registered voters and met all lawful requirements of *Ind. Ann. Stat.* §§29-3801 et seq.

12. Plaintiff's representatives tendered said petitions to William C. Lloyd, Administrative Assistant to and Representative of defendant Governor Whitcomb.

13. William C. Lloyd acting on behalf of defendant Governor Whitcomb refused to accept said petitions for filing.

14. William C. Lloyd acting on behalf of defendant Governor Whitcomb informed plaintiff's representatives that defendant Governor Whitcomb would not certify said petitions as legal petitions and that the decision was based on *Ind. Ann. Stat.* §29-3812 and the Indiana Attorney General Opinion #11 of August 28, 1972. This decision was made with no hearing or safeguard procedures afforded plaintiffs.

15. Plaintiffs are currently in possession of said petitions. These petitions have sufficient signatures and satisfy

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all provisions of the Indiana Election Code except *Ind. Ann. Stat.* §29-3812. Further, plaintiffs are prepared to tender said petitions to defendants at any time.

16. *Ind. Ann. Stat.* §29-3812 states:

> "Elections—Ballots—Certain political parties barred—Doctrine and purposes of party—Investigation.—No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act (chs. 28-60 of this title), or which shall have

had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. *No existing or newly-organized political party* or organization *shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government.* The affidavit herein provided for shall be filed with the State Election Board or the County Election Board having charge of the printing of the ballot on which such ticket is to appear." (Emphasis supplied.)

17. Plaintiff Communist Party of Indiana, its officers and candidates decline to subscribe and refuse to file an [51] affidavit as required by *Ind. Ann. Stat.* §29-3812 on the grounds that such requirement is an evasion of fundamental rights secure to them under the Constitution of the United States.

18. At the request of the defendant Indiana State Election Board, Theodore Sendak, Attorney General of Indiana, issued official Attorney General Opinion #11. In said

opinion the Attorney General states that *Ind. Ann. Stat.* §29-3812 is valid and binding, and any political party which fails to adhere to the provisions which require the signing of loyalty oath described therein must not be placed on the Indiana ballot. The Attorney General further held the Communist Party of Indiana is not a political party in the same sense of the word as an indigenous political party in a representative democracy. Therefore, the Attorney General held that the Communist Party of Indiana would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit required by *Ind. Ann. Stat.* §29-3812.

19. *Ind. Ann. Stat.* §29-3812, as construed by the Indiana State Election Board and the Attorney General of Indiana required the Board to rule, and it did rule, that the nomination petitions that plaintiff Communist Party of Indiana attempted to file were invalid because they were not in conformity with *Ind. Ann. Stat.* §29-3812 and the Board refused to certify and place on the ballot for the November, 1972 general election the elector candidates of plaintiff's.

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20. The requirements of *Ind. Ann. Stat.* §29-3812 as applied to plaintiffs violate the United States Constitution because:

(a) It is vague and overbroad and as applied in violation of plaintiffs' right to freedom of speech and association guarded by the First Amendment.

(b) It is a Bill of Attainder prohibited by Article 1, Section 10, of the United States Constitution.

(c) The affidavit requirement of *Ind. Ann. Stat.* §29-3812 has been superseded by the acts of Congress which fully occupy the field to which these provisions of *Ind. Ann. Stat.* §29-3812 relate, rendering the latter invalid and unenforceable because it is repugnant to the Supremacy Clause, Article VI, Clause 2.

(d) The only oath or affidavit required of a presidential or vice presidential candidate or of a presidential elector is that required under Article 2, Section 1, of the Constitution of the United States for the president of the United States. Such candidates or electors cannot be required to make an affidavit which he or she would not have to make as president of the United States. Therefore, under the Supremacy Clause of the United States Constitution, any oath or affidavit required by state law of such candidates or electors in addition to the one required under Article 2, Section 1, is invalid.

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(e) *Ind. Ann. Stat.* §29-3812 arbitrarily and unreasonably subjects plaintiffs to burdens not imposed on the Republican or Democratic parties, their candidates or voters in violation of plaintiffs' right to due process and equal protection guaranteed by the Fourteenth Amendment.

21. The loyalty oath provisions of the Election Code have a chilling effect on plaintiffs' exercise of their rights under the First Amendment in that there is a widespread belief among qualified voters of Indiana that *Ind. Ann. Stat.* §29-3812 is an absolute bar to the appearance of plaintiff Communist Party of Indiana and its candidates on the ballot and that the efforts to qualify the plaintiff

Communist Party of Indiana as a new political party will thereby be nullified. In consequence, qualified voters who otherwise volunteer to circulate the nomination petition have declined and will decline to do so. Furthermore, registered and qualified voters who would otherwise have signed the nomination petition have declined to do so, some for the same reason and some because they fear the consequences of having their names publicly associated with a political party and its candidates who have been stigmatized by statute and barred from the ballot as disloyal and subversive. Continued enforcement and threat of enforcement of these provisions will continue to deter qualified voters from circulating and signing the petitions.

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22. Unless this Court promptly restrains the enforcement and implementation of the aforementioned unconstitutional statutory provision, the plaintiffs will suffer serious and irreparable injury in that they will be prevented from qualifying for recognition as a new political party and will be deprived of a place on the ballot in the November, 1972 general election without adequate remedy at law. Moreover, absence of relief will subject plaintiffs to injury which will be capable of repetition at future elections, yet will be evading judicial review.

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

1. That pursuant to 28 USC §§1331, 1343, 2201, 2202, 2281 and 2284, a three-judge federal district court be immediately convened to hear and determine the merits of this case;

2. That a judgment be entered declaring *Ind. Ann. Stat.* §29-3812 to be unconstitutional facially and as applied;

3. That a preliminary and permanent injunction issue enjoining the defendants from enforcing, executing or implementing *Ind. Ann. Stat.* §29-3812;

4. That plaintiffs should be awarded all costs in connection with this action;

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5. That this Court grant such other and further relief as it may deem just and proper.

Respectfully submitted,

INDIANA CIVIL LIBERTIES UNION

By R. DAVY EAGLESFIELD
ROBERT JUSTICE
WILLIAM RASTETTER

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Stipulation of Facts

[CAPTION OMITTED]

Come now all parties by counsel and hereby stipulate as to the following:

1. Plaintiff Communist Party of Indiana is a division of the Communist Party of the United States and seeks recognition as a new political party pursuant to *Ind. Ann. Stat.* Sections 29-3801, *et seq.*, so that candidates may secure a place on the ballot in Indiana for the 1972 general election.

2. On August 31, 1972, representatives of plaintiff Communist Party of Indiana presented over 1,600 petitions containing more than 9,000 signatures of persons to the office of defendant, Edgar D. Whitcomb; these signatures are in excess of the amount required by *Ind. Ann. Stat.* Section 29-3801.

3. While present in the office of defendant Governor Whitcomb on August 31, 1972, plaintiffs' representatives tendered said petitions to William C. Lloyd, Administrative Assistant to and representative of defendant Governor Whitcomb.

4. William C. Lloyd, acting on behalf of defendant

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Governor Whitcomb and pursuant to instructions of defendant Governor Whitcomb, refused to accept said petitions for filing.

Stipulation of Facts

5. William C. Lloyd, acting on behalf of defendant Governor Whitcomb, informed plaintiffs' representatives that their petitions would not be certified as legally valid petitions and that defendants admit this decision was based in part on *Ind. Ann. Stat.* Section 29-3812 and Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972.

6. The statement made by William C. Lloyd to plaintiffs' representatives that plaintiffs' petitions would not be certified as legally valid petitions was made pursuant to instructions from the State Election Board.

7. The one ground made known to plaintiffs for defendant Governor Whitcomb's refusal to accept said petitions for filing and a basis for defendant Indiana State Election Board's position that said petitions should not be certified as legally valid petitions, regardless of whether an affidavit prescribed by *Ind. Ann. Stat.* Section 29-3812 has been filed, was the provisions of *Ind. Ann. Stat.* Section 29-3812 as construed in Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972.

8. That the number of registered voters whose signatures are needed on petitions to comply with *Ind. Ann.* [78]
Stat. Section 29-3801, which requires the signatures of ½ of 1% of the total votes for Secretary of State at the last previous general election is 8,466.

Stipulation of Facts

Dated this 22nd day of September, 1972.

THOMAS NEAL
Deputy Attorney General

EDWARD W. JOHNSON
Assistant Attorney General
Attorneys for Defendants
Office of Attorney General
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Telephone: 317—633-6234

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ROBERT JUSTICE
Attorneys for Plaintiffs
Indiana Civil Liberties Union
527 Thomas Building
Indianapolis, Indiana 46204
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Part II of Defendants' Motion to Dismiss

Come now the defendants and for Part II of their Motion to Dismiss move the court to dismiss this action for failure to state a cause of action upon which relief can be granted pursuant to Rule 12b (6) for the following reasons:

1. The plaintiffs base their action on Title 42 U.S.C. 1983. Plaintiff Communist Party of Indiana is not a person and obtains no rights under this section for that reason.

2. Plaintiff Communist Party of Indiana is denied rights under Title 42 U.S.C. 1983 by Title 50 U.S.C. section 841 *et seq.* and in particular section 842. Title 50 U.S.C. section 842 reads as follows:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section

shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, § 3, 68 Stat. 776.

WHEREFORE, Defendants ask that this action be dismissed.

THEODORE L. SENDAK
Attorney General of Indiana

THOMAS R. NEAL
Deputy Attorney General

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Answer to Amended Complaint

[CAPTION OMITTED]

First Defense

Come now the defendants and for the first defense to plaintiffs' amended complaint filed herein by the plaintiffs allege as follows:

1. The answer to rhetorical paragraph 1 of plaintiffs' amended complaint defendants admit the allegations, stating that the action challenges Burns' Ind. Stats. §29-3812, but deny all other allegations.

2. For answer to rhetorical paragraph 2, defendants admit that this action is alleged under Title 42, U.S.C. §1983 and that jurisdiction is sought pursuant to Title 28 U.S.C. §§1341, 1343, 2201, 2202, 2281 and 2284, but deny that the amount in controversy exceeds the amount of 10,000 and further that this Court has jurisdiction.

3. Defendants admit rhetorical paragraph 3 of plaintiffs' amended complaint.

4. Defendants admit the allegations contained in rhetorical paragraph 4 of plaintiffs' amended complaint.

5. Defendants admit the allegations contained in rhe-

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torical paragraph 5 of plaintiffs' amended complaint.

Answer to Amended Complaint

6. Defendants are without knowledge as to the first sentence and deny all other allegations set out in rhetorical paragraph 6 of plaintiffs' amended complaint.

7. Defendants admit the allegations contained in rhetorical paragraph 7 of plaintiffs' amended complaint.

8. Defendants deny the allegations contained in rhetorical paragraph 8 of plaintiffs' amended complaint.

9. Defendants are without knowledge as to the truth of the allegations set out in rhetorical paragraph 9 of plaintiffs' amended complaint.

10. Defendants are without knowledge as to the truth of the allegations set out in rhetorical paragraph 10 of plaintiffs' amended complaint.

11. Defendants admit the allegations of rhetorical paragraph 11 of plaintiffs' amended complaint, that the representatives of the plaintiffs, Communist Party of Indiana, went to the office of Defendant Whitcomb on August 31, 1972, for the purpose of submitting petitions required by Burns' §29-3801 *et seq.*, but deny that said petitions numbered over 1600 and contained over 12,000 signatures of registered voters and met all lawful requirements of Burns' Ind. Ann. Stats. §29-3801 *et seq.*

12. Defendants admit the allegations contained in rhetorical paragraph 12 of plaintiffs' amended complaint.

Answer to Amended Complaint

13. Defendants admit the allegations contained in rhetorical paragraph 13 of plaintiffs' amended complaint.

14. In response to rhetorical paragraph 14 of plaintiffs' amended complaint defendants admit that William C. Lloyd, acting on behalf of defendant Whitcomb, informed the plaintiffs' representatives that defendant Whitcomb would not certify said petitions as legal petitions and that the decision was based, *in part,* on Burns' §29-3812 and
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the Indiana Attorney General's Opinion #11. Defendants deny this decision was made without procedural safeguards.

15. In answer to rhetorical paragraph 15 of plaintiffs' amended complaint the defendants state that they are without knowledge as to the current possession of petitions and deny all other allegations.

16. Defendants admit the allegations contained in rhetorical paragraph 16 of plaintiffs' amended complaint.

17. For answer to rhetorical paragraph 17 of plaintiffs' amended complaint defendants admit that the plaintiffs refused to prepare and file an affidavit as required by Burns' Indiana law, but deny all other allegations therein contained.

18. Defendants admit the allegations contained in rhetorical paragraph 18 of plaintiffs' amended complaint except that Attorney General's Opinion #11 contains more grounds for its position than those alleged.

Answer to Amended Complaint

19. In answer to rhetorical paragraph 19 of plaintiffs' amended complaint, the defendants admit the allegations therein contained except that defendants deny any implication therein contained that petitions submitted by plaintiffs were valid in all respects except that they were not in conformity with Indiana Annotated Statute, Sec. 29-3812.

20. Defendants deny the allegations contained in rhetorical paragraph 20 of plaintiffs' amended complaint.

21. Defendants deny the allegations contained in rhetorical paragraph 21 of plaintiffs' amended complaint.

22. Defendants deny the allegations contained in rhetorical paragraph 22 of plaintiffs' amended complaint.

Second Defense

The plaintiffs' action is barred by the doctrine of laches in that they have failed to pursue diligently the vindication of their alleged [88] rights and have thereby placed upon the defendants a great burden. Plaintiffs, by their own admission, knew in April of 1972 that they were going to seek a position on the ballot and accordingly began obtaining the required signatures on petitions pursuant to Ind. Ann. Stat. §§29-3801 *et seq.* However, they have waited until the last minute to file their petitions and attempt through this Court to obtain a position on the ballot. Because of the dilatory manner in which the plaintiffs have proceeded, the defendants have been required to check, at the last minute, the validity of the signatures submitted,

forestall the printing of the ballots, a process which would normally have already begun, as well as prepare to defend this litigation. Plaintiffs' "eleventh hour" attempt to secure a position on the ballot has created a burden on the defendants which could have been avoided had the plaintiffs been diligent in seeking relief in April of 1972 when the ripening seeds of this controversy existed.

Third Defense

For third defense to plaintiffs' amended complaint defendants allege as follows:

1. That the petitions submitted by the plaintiffs herein falsely and inaccurately represent the parties signing as qualified to sign the petitions.

2. That in fact there were not sufficient signatures by qualified persons to qualify the petitions under the statutory requirements set forth in Acts 1945, Ch. 208, §106, as amended, and found in Burns' Ann. Stat. (1969 Repl.) 29-3801.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint.

THEODORE L. SENDAK
Attorney General of Indiana

THOMAS R. NEAL
Deputy Attorney General

EDWARD W. JOHNSON
Deputy Attorney General

[94]

Petition for Mandate to Enforce the Prior Order of the Court

[Filed Oct. 3, 1972]

[CAPTION OMITTED]

In *Communist Party of Indiana* v. *Edgar D. Whitcomb*, Cause No. 72 H 224 (September 28, 1972), a three-judge panel ordered the Communist Party of Indiana to submit at any time prior to 2:00 p.m. on Friday, September 29, 1972, an oath pursuant to the context of that opinion that said party does not advocate the overthrow of local, state or national government by force or violence. The Order further stated that if said oath was submitted by the Communist Party to the State Election Board or its representative within the time limit specified above, then said party should be certified by the State Election Board for inclusion on the national ballot upon which said party sought inclusion. The Order further stated:

[95]

"In the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant State Election Board and members thereof shall certify said party and cause their inclusion on the National Ballot printed in the state of Indiana as well as upon the labels used on all voting machines in this state."

On September 29, 1972, at 11:36 a.m., the Communist Party of Indiana submitted to a representative of the State

Election Board an oath in keeping with the Memorandum and Order aforementioned. At that time said affidavit was accepted by a representative of the State Election Board and stamped *filed*. Said affidavit is attached as *Exhibit A*.

In order to make it perfectly clear to the State Election Board, the Court and the citizens of Indiana, that said party was not perjuring itself, the last sentence of said affidavit was attached. This last sentence is not intended to legally modify the oath taken above, but states the law as it applies to the term "advocate," as stated by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320. Thus, the plaintiff, Communist Party, can with a clear conscience sign the attached affidavit.

Also at the time of filing the above-mentioned affidavit were filed, with the same representative of the State Election Board, approximately 12,000 signatures on petitions as required by *Ind. Ann. Stat.* §29-3801, *et seq.* These were also accepted by said representative.

[96]

After the acceptance of said documents, the Communist Party of Indiana, was told by Wayne Davis, Chief Deputy of the Election Board, to be at a meeting of the Election Board to be held in the State House at 2:15 p.m., September 29, 1972.

At said meeting the State Election Board disregarded the Order of the three-judge panel and would not include the Communist Party on the National Ballot in the upcoming November election for the reason that the attached affidavit did not comply with the Court Order and on the grounds that the petitions filed with the Board were insufficient.

Petition for Mandate to Enforce the Prior Court Order

WHEREFORE, the plaintiffs request the Court issue an order mandating and requiring said defendants to comply with the September 28, 1972, Order of the three-judge panel and cease their refusal to include plaintiff Communist Party on the national ballot.

INDIANA CIVIL LIBERTIES UNION

By R. DAVY EAGLESFIELD III
527 Thomas Building
Indianapolis, Indiana 46204
Telephone: 317-635-4056

STATE OF INDIANA,
COUNTY OF MARION, *ss.*:

Subscribed and sworn to before me, a Notary Public, in and for the above county and state, this 29th day of September, 1972.

MELISSA D. POLLARD
Notary Public

My commission expires:
May 31, 1976

[97]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Mandate has been delivered to the Attorney General of Indiana, State Capitol Building, Indianapolis, Indiana, this 29th day of September, 1972.

R. DAVY EAGLESFIELD III

[98]

AFFIDAVIT

We, the undersigned officers of the Communist Party of Indiana, upon our oaths do hereby swear that said Party does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action."

SIMON BOORDA
Simon Boorda, Chairman
Communist Party of Indiana

AVANELLE BOORDA
Avanelle Boorda, Treasurer
and Acting Secretary
Communist Party of Indiana

Petition for Mandate to Enforce the Prior Court Order

STATE OF INDIANA,
COUNTY OF MARION, *ss.*

Subscribed and sworn to before me, a Notary Public in and for the above county and state, this 29th day of September, 1972.

MELISSA D. POLLARD
Notary Public
FILED
Sep 29 1972
STATE ELECTION BOARD
11:36 A.M.

My commission expires:
May 31, 1976

[111]

Motion to Amend

[Filed Oct. 10, 1972]

[CAPTION OMITTED]

Come now plaintiffs by counsel, pursuant to Rule 52(b) and Rule 59(e) of the Federal Rules of Civil Procedure, and move the court for an order amending the Memorandum and Order issued by this court on September 28, 1972, in the following respects:

1. Include a determination and conclusion of law that the portion of IND. ANN. STAT. § 29-3812 providing "that it does not advocate the overthrow of local, state or national government by force or violence" is constitutional [112] only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine;

2. Include a determination, finding of fact and conclusion of law that the affidavit submitted by officers of plaintiff Communist Party to Indiana to defendants on September 29, 1972, complies in all respects with the September 28, 1972 Memorandum and Order as amended; the Amended Memorandum and Order should thus once again compel defendants to place plaintiff Communist Party of Indiana and its candidates on the ballot for the 1972 general election; and

Motion to Amend

3. Include a determination and finding of fact that the evidence proffered by defendants pertaining to the validity of signatures on petitions submitted by plaintiff Communist Party of Indiana was by acknowledgement of defendants' attorneys in open courtroom insufficient to prove their contention that plaintiff Communist Party of Indiana has not submitted petitions which meet the requirements of IND. ANN. STAT. § 29-3801 *et seq.*

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
Attorneys for Plaintiffs
527 Thomas Building
Indianapolis, Indiana

[119]

Notice of Appeal

[Filed Oct. 10, 1972]

[CAPTION OMITTED]

Pursuant to 28 U.S.C. § 1253, plaintiffs in the above-captioned cause hereby give notice that they appeal to the United States Supreme Court this court's order denying injunctive relief requested by plaintiffs insofar as this court held the first portion of IND. ANN. STAT. § 29-3812 to be constitutional.

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
527 Thomas Building
Indianapolis, Indiana

[129]

Motion to Withdraw Notice of Appeal

[Filed Oct. 17, 1972]

[CAPTION OMITTED]

Come now plaintiffs in the above-captioned matter, by counsel, and hereby request this honorable court for leave to withdraw their Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972, and in support of this motion plaintiffs allege and say:

1. That on October 10, 1972, plaintiffs filed a Notice of Appeal with this court.

2. That said Notice of Appeal was filed solely because plaintiffs were attempting to obtain emergency relief from the United States Supreme Court.

3. That the United States Supreme Court has subsequently decided not to hear plaintiffs' request for emergency relief.

4. That the purpose for plaintiffs filing said Notice of Appeal has thus been obviated.

5. That plaintiffs desire this court to act upon their Motion to Amend filed on October 10, 1972, prior to deciding whether they intend to appeal the decision in this cause.

Motion to Withdraw Notice of Appeal

[130]

6. That therefore plaintiffs desire to withdraw their Notice of Appeal so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972.

WHEREFORE, plaintiffs respectfully request this honorable court to allow them to withdraw their Notice of Appeal as prayed.

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
Attorneys for Plaintiffs
527 Thomas Building
Indianapolis, Indiana 46204

Opinions

The relevant opinions and orders of the United States District Court are contained in the Appendix to the Jurisdictional Statement at pp. 1a-6a. Appellants' November 29, 1972 Notice of Appeal is contained in the Appendix to the Jurisdictional Statement at p. 7a. The Indiana Attorney General's Official Opinion No. 11 is contained in the Appendix to the Jurisdictional Statement at pp. 9a-19a.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DeMOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JURISDICTIONAL STATEMENT

R. DAVY EAGLESFIELD III
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the United States District Court for the Northern District of Indiana, declaring that the oath contained in *Ind. Ann. Stat.* §29-3812 is severable and that, as so separated, the first portion is constitutional. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions and Orders

The memorandum and orders of the District Court of the Northern District of Indiana are unreported. They are set forth in the Appendix, *infra*, pp. 1a-6a. Decisions on Applications to this Court for stays are reported at 93 S. Ct. 16 and 93 S. Ct. 28.

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and U.S. Const. Art. I, §10; Art. II, §1; Art. VI, Clause 2; Amendment I and Amendment XIV. Jurisdiction was based on the above provisions and on 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284. The three-judge district court was asked to declare invalid and enjoin enforcement of *Ind. Ann. Stat.* §29-3812. The Memorandum and Order of the three-judge district court was entered on September 28, 1972; Appellants' Petition for Mandate to Enforce the Prior Order of the Court was denied on October 4, 1972; Appellants' Motion to Amend was denied on October 31, 1972; and Appellants' Notice of Appeal was filed in the district court on November 29, 1972.[1] The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by 28 U.S.C. §1253. Cases supporting jurisdiction include *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972).

---

[1] Appellees in the instant case filed a Jurisdictional Statement also appealing the decision below on January 13, 1973. *Whitcomb* v. *Communist Party of Indiana*, No. 72-990.

Question Presented

Whether Appellants' right under Art. I, §2 and Art. VI, clause 3 of the Constitution, and the First and Fourteenth Amendments, are violated by the Indiana law conditioning access of Appellant party and its candidates to a place on the Indiana Ballot upon a commitment from the officers of Appellant party that it does not engage in constitutionally protected advocacy, i.e., the mere advocacy or teaching of abstract ideas, beliefs and principles as divorced from illegal action.

Statute Involved

The statute in controversy in this case is *Ind. Ann. Stat.* §29-3812 which reads as follows:

> 29-3812. Elections—Ballots—Certain political parties barred—Doctrine and purposes of party—Investigation.—No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act [chs. 28-60 of this title], or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doc-

trines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed new party and the expense of such investigation by the state election board shall be paid out of the general funds of the state treasury not otherwise appropriated, provided the amount of such appropriation shall not exceed five hundred dollars [$500]; and the expense of the investigation by the county election board shall be paid out of the funds in the treasury, not otherwise appropriated, provided the amount of such appropriation shall not exceed three hundred dollars [$300], and if the board is of the opinion that such existing or proposed new party advocates doctrines which are

in violation of the provisions of this act [chs. 28-60 of this title], or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot. [Acts 1945, ch. 208, §117, p. 680.]

Statement of the Case

The appellants are the Communist Party of Indiana, a new political party in Indiana seeking a position upon the Indiana Ballot; Gus Hall and Jarvis Tyner, the Party's candidates in 1972 for President and Vice President of the United States, respectively, who intend to seek those offices in 1976; Simon Boorda, Jesse Reece, and Mike Bayer, officers of the Communist party of Indiana who desire that the Party appear on the Indiana Ballot in future local, state and federal elections; and Ruth Norrick, a registered voter in Lake County, Indiana who, on behalf of all qualified voters similarly situated, desires that the Party and its candidates be placed upon the Indiana Ballot in future elections, in order that she and the class she represents may be able to vote for such candidates. The Appellees are Edgar D. Whitcomb, Karl J. Stipher and Thurman DeMoss, individually and together as the Indiana State Election Board. The Appellees, acting on behalf of the State Election Board must certify all new political parties before they may be placed upon the Indiana Ballot.

Before a new political party will be admitted to a position on the ballot in Indiana, *Ind. Ann. Stat.* §29-3801 *et seq.* requires such party to submit to Appellees for certification, petitions signed by registered voters equalling "one-half of one-percent [½%] of the total vote of all parties cast in

the state for Secretary of State at the last preceding general election." In pursuit of their goal, Appellant party gathered the requisite number of signatures on petitions. These petitions were tendered to Appellees prior to the statutory deadline of September 1, 1972, and complied in all respects with *Ind. Ann. Stat.* §§29-3801 *et seq.*, except for the absence of an accompanying affidavit required by §29-3812:

> . . . that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. *Ind. Ann. Stat.* §29-3812 (Burns' 1969 Repl.).

Appellants did not comply with the statute because, in their opinion, it required an oath broader than permitted by the Constitution.

The Appellee Election Board, confronted with the fact that the Appellant party had satisfied all statutory requirements to be placed on the ballot, except submitting the aforementioned oath, requested an opinion from the Attorney General of Indiana whether Appellees should prohibit Appellant party's candidates from the ballot.

The Attorney General of Indiana in Official Opinion No. 11, dated August 28, 1972, answered:

> It is, therefore, my Official Opinion that the provisions and requirements of IC 1971, 3-1-11-12, as found at Burns' Ind. Stat. Ann. *Section 29-3812* (1969 Repl.) are currently valid and enforceable, and prohibit from

> appearing on the ballot the name of any political candidates who, or parties whose officers, refuse to sign the affidavit required by that statute.
>
> The Indiana law recited in the foregoing analysis clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government or carries on a program in any way affiliated with a foreign government or related to any political group within any foreign government.
>
> • • • • •
>
> Therefore, the Communist Party would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit because that would be an obvious perjury in view of the Communists' stated purposes. And those Indiana officials who would be responsible for placing the Communist Party on the ballot could be subject to Federal criminal prosecution as well under the *Smith Act* and the *Communist Control Act.*
>
> There is no constitutional or common-sense requirement for a free state to fertilize the seeds of its own destruction.[2]

Shortly after receiving this Opinion the Election Board, relying upon *Ind. Ann. Stat.* §29-3812 and the Opinion, re-

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[2] In concluding that the Indiana statute was both applicable and constitutional, the Attorney General surveyed a number of recent court decisions, including one by the Indiana Supreme Court holding that the Socialist Labor Party had, in 1968, submitted insufficient affidavits under the act, and therefore could not appear on the ballot. *State ex rel. Socialist Labor Party* v. *State Election Board of Indiana,* 241 N.E.2d 69 (1968) (Ind. S.C.). The whole of Official Opinion No. 11 is set out in the Appendix, *infra,* pp. 9a-19a.

fused to accept or examine the petitions of Appellant party. This action barred Appellant party and its candidates for public office from the ballot.

Thereafter, Appellants filed suit in the United States District Court for the Northern District of Indiana, requesting the convening of a three-judge court, the issuance of an injunction, and a declaratory order that *Ind. Ann. Stat.* §29-3812 was unconstitutional. The complaint alleged that the Indiana statute was vague and overbroad in violation of the First and Fourteenth Amendments, constituted a Bill of Attainder prohibited by Art. I, §10 of the Constitution, contravened the supremacy clause, Art. VI, Clause 2 of the Constitution, and unlawfully exceeded the oath of office provided in Art. II, §1 of the Constitution.

On September 28, 1972, a three-judge court was convened. At this hearing actions were also heard involving the American Independent Party and the Indiana Peace and Freedom Party, which had also been refused certification because of improper affidavits filed pursuant to the aforementioned statute.

The only issue presented by Appellants at this hearing was the constitutionality of *Ind. Ann. Stat.* §29-3812. The Court in its Memorandum and Order, Appendix, *infra*, pp. 2a-3a, ruled:

> We have concluded that the loyalty oath, so-called, contained in *Ind. Ann. Stat.* 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing 'that it does not advocate the overthrow of local, state or national gov-

> ernment by force or violence,' is constitutional and hence enforceable by Indiana.[3]

The Court then ordered that Appellees accept from Appellant Communist Party an oath consistent with its opinion, and in the event such an oath was submitted, the Court ordered that Appellees certify said Party and cause its inclusion on the national ballot printed in the State of Indiana. Under continued protest that the Indiana statute was unconstitutional on its face, but to assure the Appellant Party and Appellant candidates a ballot position in 1972, an effort was made to comply with the Court's opinion.

Because the Appellant party is at the very least constitutionally entitled to engage in advocacy of overthrow of government that is not related to imminent action, and because Official Opinion No. 11 of the State Attorney General stated that it "would be an obvious perjury" if the officers of the Communist Party should sign an affidavit pursuant to *Ind. Ann. Stat.* §29-3812, the officers of Appellant party filed an affidavit that the Party does not:

> . . . advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in Yates v. United States, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (Appendix, *infra*, p. 8a.)

---

[3] The district court declared unconstitutionally broad and vague so much of the Indiana statute as required an affidavit of non-association with foreign governments, political parties, organizations or groups. Appellees in the instant appeal have separately appealed from that portion of the Order. *Whitcomb* v. *Communist Party of Indiana* (No. 72-990).

The State Election Board upon the submission of this oath refused to certify Appellant party and include it upon the Ballot. (The oaths of the other plaintiff political parties were accepted.) The reasoning of Appellees, as expressed to Appellants at a hearing held on September 29, 1972, was that the term "advocate" as required by *Ind. Ann. Stat.* §29-3812, includes the advocacy and teaching of abstract ideas, beliefs and principles divorced from action.

Immediately thereafter Appellants filed a Petition for Mandate to Enforce the Prior Order of the Court. This petition was denied by the district court on October 4, 1972. Appellants' Motion to Amend was also denied by the Court on October 31, 1972.[4] The Motion to Amend requested that the district court enjoin enforcement of the statute outright and at the very least to declare "that the portion of *Ind. Ann. Stat.* §29-3812 providing 'that it [the certifying Party] does not advocate the overthrow of local, state or national government by force or violence' is constitutional only insofar as it prescribes advocacy directed at primary unlawful action as distinguished from

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[4] In addition to these proceedings, on September 29, 1972, the Appellees made simultaneous applications with the district court and the Supreme Court to reconsider the decision and to stay the mandate. On October 5th, the Appellants filed in the Supreme Court a response in opposition and a cross motion to enforce the district court mandate and to stay so much of the district court decision as favored Appellees. The cross motions were denied by the full Court on October 5th. 93 S. Ct. 28. On October 6th, the Appellants filed in this Court an emergency application for stay of the order of the district court. It was denied on the same day by Mr. Justice Rehnquist. 93 S. Ct. 18. On January 13, 1973, the Appellees in the instant appeal filed a Jurisdictional Statement appealing the district court decision to the extent that the Indiana statute was declared in part unconstitutional. *Whitcomb v. Communist Party of Indiana*, No. 72-990.

advocacy of abstract doctrine." In effect, therefore, the district court has not only sustained the Indiana requirement of a loyalty oath, but it has accepted the ruling of the Appellees that the term "advocacy" as used in *Ind. Ann. Stat.* §29-3812 precludes merely expressing abstract ideas, beliefs and principles divorced from action.

The Question Is Substantial

The substantiality of the question presented in this appeal follows from this Court's actions in the case of *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972), where the Court would have reviewed the constitutionality of Ohio's requirement of a political party loyalty oath but for the fact that the issue was not presented in a posture ripe for judicial resolution. But there is no possibility of unripeness here. Appellants were denied a ballot position solely because of the loyalty oath requirement, and they have been threatened with perjury sanctions. Despite their unsuccessful efforts to comply with the district court's decision these deprivations entitled them to present the full range of constitutional challenges that are raised in the complaint. *Cramp* v. *Board of Public Instruction,* 368 U.S. 268 (1961). Similarly, there is no issue of mootness. The class scope of the action, the request for broad injunctive and declaratory relief, the allegations of future harm, the fact that involved in the case is a ". . . problem . . . 'capable of repetition, yet evading review' . . .", all make it clear that this is a live case fit for appellate review. *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969). Compare *Brockington* v. *Rhodes,* 396 U.S. 41 (1969).

Unlike the Massachusetts oath in *Cole* v. *Richardson*, 31 L.Ed.2d 593, 603 (1972), the Indiana oath is something "more than an amenity," for despite their efforts to comply with the district court order, Appellants have been denied and will continue to be denied their right to run candidates for public office, to stand for public office, and to vote for candidates of the Communist Party, solely because of the oath. Moreover, Appellants' party and candidates, again unlike the situation of the plaintiff in *Richardson*, have been threatened specifically with perjury prosecution if they submit an oath in the form required by Appellees.

1. *The Decision of the District Court Is Inconsistent With Controlling Decisions of This Court Concerning First Amendment Rights of Advocacy.*

Once the district court rendered its initial decision, the Appellants were faced with a dilemma that was compounded when all avenues for emerging relief were exhausted fruitlessly. Appellants could decline to make any effort to comply with the district court's order, and thereby relinquish all possibility of participating in the 1972 election. On the other hand, Appellants could sign an affidavit in the form required by the Appellees (under the district court's opinion), and thereby risk prosecution for perjury (Ind. A.G. Official Opinion No. 11, Aug. 22, 1972, p. 9, Appendix, *infra*, p. 19a) and also relinquish the opportunity to seek vindication of their constitutional rights on appeal (*Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972)).

Obviously, neither alternative was satisfactory. Hence, under protest, Appellants filed an affidavit (Appendix, p. 8a) that insulated them from good faith perjury prosecution and reserved their fundamental constitutional claims.

When the State Election Board rejected this affidavit, and the district court confirmed the rejection, Appellants were irreparably denied their constitutional rights. Significantly, the rejection of the affidavit was also rejection of the principle of cases such as *Yates* v. *United States,* 354 U.S. 298, 320 (1957); *Noto* v. *United States,* 367 U.S. 290, 297-98 (1961), and *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), which firmly establish the First Amendment right to engage in advocacy of resort to violent overthrow of government as long as the advocacy does not involve "incitement to imminent lawless action." *Brandenburg* v. *Ohio, supra,* 395 U.S. at 449. As this Court has made abundantly clear, the principle of the decisions precluding criminal prosecution for engaging in advocacy not imminently inciting lawless conduct precludes the conditioning of statutory rights on overly broad loyalty oaths. E.g., *Cole* v. *Richardson,* 31 L.Ed.2d 593, 600 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). See generally, *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 6 (1971).[8]

In *Cole* v. *Richardson,* the majority of this Court concluded that the proper test in evaluating loyalty oaths is whether the oath exacts a commitment to refrain only from the use of illegal activities or whether the oath is so broad and vague that it exacts a commitment to refrain from entertaining "political beliefs" or from engaging in "protected speech activities." 31 L.Ed.2d at 600, 602. Under this test the majority upheld the constitutionality of the Massachusetts loyalty oath by reading it narrowly to proscribe only the use of "illegal and constitutionally unpro-

[8] Of course the meaningful threat of perjury prosecution made by the Indiana Attorney General may well render moot any possible question of a difference in standards in civil and criminal deprivations.

tected force to change the constitutional system." 31 L.Ed. 2d at 602.

The oath required under *Ind. Ann. Stat.* §29-3812, as interpreted by the Appellees and the District Court, goes substantially beyond the explication approved in *Richardson*. It effectively disqualifies a political party and its candidates from access to the ballot if such party advocates the abstract principle of overthrow of local, state, or national government by force or violence. Thus, Appellants are precluded from participating in the political process. On the other hand, as interpreted by this Court, the oath examined in *Richardson* does not require anyone to refrain from advocating or believing in any objectionable ideas.[6] The Indiana oath regrettably does. And it cannot be fairly construed to allow such beliefs and advocacy. See *State ex rel. Socialist Labor Party* v. *State Election Board of Indiana*, 241 N.E.2d 69 (1968) (implied). It is therefor unconstitutionally broad and vague. See, e.g., *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 268 (1961).

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[6] The oath involved in *Richardson* required every person entering the employ of the Commonwealth (presumably including elected officials) to take the following oath:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method.

2. *The Decision of the District Court Is Inconsistent With Controlling Decisions of This Court Recognising the First Amendment Rights to Stand for Public Office and to Vote for Candidates of One's Choice, and Exceeds the Constitutionally Prescribed Oath of Office.*

Appellant party's right to qualify as a new political party and to gain access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of Appellant candidates. "[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms." *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968). Access to the ballot is included within the First Amendment's protection: "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id.* at 31.

The First Amendment's protection of the rights of the individual voter-appellants must also be considered. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964). A fundamental principle in our democracy is that "the people should choose whom they please to govern them" and "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell* v. *McCormack,* 395 U.S. 486, 547 (1969). The assertion by the Attorney General in his Official Opinion No. 11—"There is no constitutional or common sense requirement for a free state to fertilize the seeds of its own destruction"—flies in

the face of the First Amendment and violates prior decisions of this Court.

The electorate should have the unhampered opportunity to cast their votes at the polls for the widest variety of political programs. The act of casting a ballot is the ultimate purpose behind the exercise of First Amendment rights. What good is it to be able to express one's views freely if there is no ultimate opportunity to try to elect a government that shares those views? To foreclose any political party or candidate from the electoral process because of ideology or because they engage in constitutionally protected advocacy destroys the central function of the First Amendment. Indeed, to so foreclose a party or candidate from the ballot is not only constitutionally intolerable, it is also counterproductive. See generally, T. Emerson, *The System of Freedom of Expression,* p. 202 (1970).

Even assuming government has a subordinating interest in denying public office to those who do not adhere to the principles of the Constitution and orderly government, cf. *Cole* v. *Richardson,* 31 L.Ed.2d 593 (1972); *Healy* v. *James,* 33 L.Ed.2d 266 (1972), denial of ballot position is not the kind of less drastic alternative allowed to government by the Constitution. E.g., *United States* v. *Robel,* 389 U.S. 258 (1967). The constitutional oath required of office takers should be quite sufficient to serve any government need. See *Bond* v. *Floyd,* 385 U.S. 116 (1966).

Appellants contend that no oath or political test may be imposed on candidates for office and their parties, as opposed to office takers. However, if any oath may be required, it must be limited to the oath that may constitutionally be imposed on the office taker. Hence, simple

affirmation to support the Constitution is all that may be required. U. S. Const. Art. II, §1, cl. 8; Art. VI, cl. 3. These provisions and the First Amendment combine to permit an oath of office or candidacy that is no more far reaching in its substance. See *Cole* v. *Richardson*, 31 L.Ed.2d 593 (1972); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *LSCRRC* v. *Wadmond*, 401 U.S. 154 (1971); *Bond* v. *Floyd*, 385 U.S. 116 (1966) (semble); cf. *Powell* v. *McCormack*, 395 U.S. 486 (1969), where this Court invalidated any test for congressional office other than those that were expressly prescribed in the Constitution. As Chief Justice Vanderbilt of the New Jersey Supreme Court held under the New Jersey Constitution, there is nothing in the text nor in the history of the Constitution "that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered thereby." *Imbrie* v. *Marsh*, 3 N.J. 578, 71 A.2d 352, 360 (1950).

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

R. Davy Eaglesfield III
William Rastetter
Indiana Civil Liberties Union
527 Thomas Building
Indianapolis, Indiana 46204
317-635-4056

Melvin L. Wulf
Sanford Jay Rosen
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

January 1973.

Memorandum and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

No. 72 H 224

COMMUNIST PARTY OF INDIANA, *et al.*,

Plaintiffs,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

No. 72 H 230

INDIANA AMERICAN INDEPENDENT PARTY,

Plaintiff,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

No. 72 H 245

INDIANA PEACE AND FREEDOM PARTY, *et al.*,

Plaintiffs,

v.

EDGAR D. WHITCOMB, *et al.*,

Defendants.

Memorandum and Order

The captioned three civil rights cases allegedly filed pursuant to 42 U.S.C. § 1983 raise substantially similar issues regarding the constitutionality of Ind. Ann. Stat. § 29-3812 and, more particularly, as such section contains a requirement for a loyalty oath required of existing or newly organized political parties or organizations in order that their names be placed on the ballot in Indiana.

Separate motions to dismiss in each action filed by all defendants have been and are denied. This court has jurisdiction. All three causes have been consolidated for hearing and determination, and trial on the merits has been advanced and consolidated with hearing on the respective motions for preliminary injunction.

Numerous contentions have been advanced by the respective plaintiffs in support of their position and various defenses have been interposed in each action by the defendants. Because these actions come on for consideration within hours of the deadline by which Indiana must commence the printing of both its state and national ballots, it is impossible to exhaustively deal in this memorandum with all of the issues advanced and, in order to meet the deadline indicated by the evidence and imposed upon this court, immediate decision is required. Needless to say, consideration has been given to all contentions advanced by the plaintiffs and all defenses raised by the defendants.

We have concluded that the loyalty oath, so-called, contained in Ind. Ann. Stat. 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing "that it does not advocate the overthrow of local, state or national government by force or

violence," is constitutional and hence enforceable by Indiana. That portion of the statute and oath providing "and that it is not affiliated with and does not cooperate with or have any relations with any foreign government or any political party, organization or group or individual of any foreign government" is unconstitutional as vague and overbroad and therefore unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and hence may not be required. Accordingly, because of the uncertainty which has arisen by virtue of the requirements of the Indiana statute, a portion of which is unconstitutional as above noted, it is no more than just to require the defendant members of the state election board to permit the three political parties plaintiff (Communist Party of Indiana, Indiana American Independent Party, and Indiana Peace and Freedom Party) to submit by the time hereinafter specified an oath pursuant to the context of this opinion and, if so submitted, be then certified by the state election board for inclusion on the state and/or national ballot upon which such party seeks inclusion as hereinafter specified.

Accordingly, it is considered and ordered that the defendants be and they are hereby ordered and directed to

(1) Accept from any one or all of the Communist Party of Indiana, the Indiana Peace and Freedom Party, and Indiana American Independent Party an oath consistent with this opinion at any time prior to 2:00 p.m. on Friday, September 29, 1972, and said defendants shall have available to such parties a member, representative or agent of the state election board for the receipt of such oath.

(2) In the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the National Ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

(3) In the event that the Indiana American Independent Party shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the state ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

(4) In the event that the Indiana Peace and Freedom Party shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant state election board and the members thereof shall certify said party and cause their inclusion on the National Ballot and the state ballot printed in the State of Indiana as well as upon the labels used on all voting machines in this state.

Enter: September 28, 1972

[Judges' Signatures Omitted]

Order of October 4, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil No. 72 H 224

[CAPTION OMITTED]

The plaintiffs in the captioned cause have filed a pleading entitled "Petition for Mandate to Enforce the Prior Order of the Court." Allegedly the petition refers to the order of the three-judge panel designated to hear this and two companion cases, which order was entered September 28, 1972.

The defendants in the captioned cause have filed a pleading entitled "Verified Motion to Reconsider and for Stay." In this motion, the defendants contend that they were not given appropriate time or opportunity in which to test the validity of signatures on the petition presented by the Communist Party of Indiana. However, in view of the fact that the State Election Board, acting in accordance with this court's order of September 28, 1972, denied the plaintiffs a place on the National ballot in Indiana, there is no issue remaining concerning the validity of signatures on plaintiffs' petition. Accordingly, the issue raised by the defendants' motion to reconsider is moot and defendants' motion does not require further ruling by this court.

The petition for mandate filed by the plaintiffs is denied. The State Election Board acted in accordance with the precise wording of this court's order of September 28, 1972.

Entered by authority of the entire panel this 4th day of October, 1972.

United States District Judge

Order of October 31, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

No. 72 H 224

[CAPTION OMITTED]

On motion of the plaintiffs, leave is granted to withdraw plaintiffs' Notice of Appeal heretofore filed, and said Notice of Appeal is now withdrawn.

The motion of the plaintiffs to amend the memorandum and order issued by this court on September 28, 1972 is denied.

This order is entered pursuant to the authority and vote of the entire panel designated to hear and consider this cause.

Entered this 31st day of October, 1972.

United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil Action No. 72 H 224

COMMUNIST PARTY OF INDIANA, *et al.*,

Plaintiffs,

—VS.—

EDGAR D. WHITCOMB, *et al.*,

Defendants.

Pursuant to 28 U.S.C. § 1253, all plaintiffs in the above-captioned cause hereby give notice that they appeal to the United States Supreme Court from that portion of this court's Memorandum and Order of September 28, 1972 which held that IND. ANN. STAT. § 29-3812 is severable and that, as so separated, that portion of said statute providing "that it does not advocate the overthrow of local, state or national government by force or violence, . . ." is constitutional and hence enforceable by Indiana.

INDIANA CIVIL LIBERTIES UNION
WILLIAM RASTETTER
R. DAVY EAGLESFIELD
527 Thomas Building
Indianapolis, Indiana 46204

[Served by mail November 28, 1972; received and filed by Clerk on November 29, 1972.]

AFFIDAVIT

We, the undersigned officers of the Communist Party of Indiana, upon our oaths do hereby swear that said Party does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action."

/s/ Simon Boorda
Simon Boorda, Chairman
Communist Party of Indiana

/s/ Avanelle Boorda
Avanelle Boorda, Treasurer and
Acting Secretary
Communist Party of Indiana

State of Indiana,
County of Marion, *ss.*:

Subscribed and sworn to before me, a Notary Public in and for the above county and state, this 29th day of September, 1972.

/s/ Melissa D. Pollard
Melissa D. Pollard
Notary Public

My commission expires:
May 31, 1976

Filed
Sep 29 1972
State Election Board
11:36 AM.

Official Opinion No. 11

STATE OF INDIANA

INDIANAPOLIS

OFFICES OF ATTORNEY GENERAL
THEODORE L. SENDAK, Attorney General
219 State House
46204

August 28, 1972

Mr. Karl Stipher
Member, State Election Board
Room 1015 State Office Building
Indianapolis, Indiana 46204

OFFICIAL OPINION No. 11

Dear Mr. Stipher:

This is in response to your request for my official opinion on the following question:

> "Are the provisions and requirements of IC 1971, 3-1-11-12, as found in Burns' Ind. Stat. §29-3812, which requires political parties to sign a loyalty affidavit still valid and enforceable and can the Communist party be placed on the Indiana ballot without signing said affidavits?"

ANALYSIS

Your question presents two separate legal issues, one whether the statute requiring what may be characterized as a loyalty oath be signed prior to being placed on the

Indiana ballot, and secondly, whether the Communist Party could be placed on the Indiana ballot in any event. The statute to which you refer provides, in part, as follows:

> "No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. * * * No existing or newly organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed

> new party * * * and if the board is of the opinion that such existing or proposed new party advocates doctrines which are in violation of the provisions of this act or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot. (Acts 1945, ch. 208, §117.)"

This Act was considered and upheld by the Supreme Court of Indiana in 1968 when called on to review the Indiana Election Board's decision *not* to place the names of candidates of the Socialist Labor Party on the election ballot for that year. In denying the Socialist Party's request to be placed on the ballot for failure to properly file the affidavit as required by Burns' Section 29-3812, and in considering the same, the Indiana Supreme Court found:

> "The legislature, very apparently, intended that any political party that appeared on the ballot of Indiana must negate, by affidavit, affiliation with any foreign government that in any manner seeks violent overthrow of the government . . . . It is obvious from reading of the affidavit filed by the Socialist Party that it did not meet the requirements of the 1945 Act, *supra,* [Acts 1945, Chapter 208, Section 117, as found in Burns' 29-3812] and therefore, was insufficient." *State ex rel., Socialist Labor Party* v. *The State Election Board of Indiana*, 1968 —— Ind. —— 241 N.E. 2d 69.

Though the Court's attention in the Socialist Labor Party case was primarily directed to determining whether or not there had been proper compliance with the Act, the

question of the constitutionality of the statute as a whole can be reasonably assumed to have been before the Court as well. When the Supreme Court of Indiana held that the Socialist Labor Party was not eligible to be on the ballot in Indiana, it impliedly ruled the Act to be constitutional and enforceable. This is the most recent interpretation in Indiana of this Act.

Other states which have considered similar statutes have upheld them. The Supreme Court of Florida has held that a loyalty oath which required the affiant to state that he or she was not a member of the Communist Party and has not and will not lend aid, support, advice, counsel or influence, to be in all respects constitutional. *State* v. *Diez* (1957) —— Fla. ——, 97 So. 2d 105.

The Supreme Court in Ohio reached a similar conclusion in *Berry* v. *Hummel* (1944), 59 N.E. 2d 238 —— Ohio ——.

The Federal Courts have been called upon to examine statutes similar in form and content to Indiana statute (Burns' Section 29-3812) and to determine their constitutionality. A Three-Judge Federal District Court in Michigan held that the state had no duty to permit one of the party members to run for Congress on the Communist ticket when he might not, in good faith, take the statutory oath to protect and defend the Constitution of the United States. *Albertson* v. *Millard* (1952), 106 F. Supp. 635.

The State of Massachusetts requires public employees to subscribe to the following oath:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth

of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method."

An individual seeking employment with a state hospital refused to take the oath, and suit was brought to have it declared unconstitutional. In a 1972 decision, the United States Supreme Court, speaking through Chief Justice Burger, held:

> *"Since there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to obide by the constitutional system in the future." Cole* v. *Richardson* (1972), 40 L. W. 4381, —— U.S. ——. [Our emphasis.]

The Court determined in *Cole* v. *Richardson, supra*: "We conclude that the Massachusetts' oath is constitutionally permissible."

On May 30, 1972, the United States Supreme Court reaffirmed this position when it refused to hear an appeal from a lower court in a case challenging the validity of an Ohio statute which is quite similar to the Indiana statute in question. In that case, the Socialist Labor Party desired to be placed on the election ballot in Ohio but did not feel that the requirement of submitting an affidavit affirming loyalty to the State and the United States was constitutional.

The lower court upheld the constitutionality of the Ohio statute, and the United States Supreme Court, in refusing to hear an appeal from that decision, stated:

"... their pleading fails to allege that the requirement [affirming loyalty by affidavit] has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party." *Socialist Labor Party et al.* v. *Gilligan, et al.* (1972), 40 L. W. 4581, —— U.S. ——.

The provisions of Burns' Section 29-3812, *supra*, are valid and binding, and any political party which fails to adhere to the provisions which require the signing of the loyalty oath described therein must not be placed on the Indiana ballot.

Your question also presents a second issue, i.e., whether the Communist Party could be placed on the Indiana ballot even if its officers signed the loyalty oath. It should be pointed out that any state officials who allowed the Communist Party's name to be placed on the Indiana ballot would also run the risk of Federal criminal prosecution under the provisions of the Communist Control Act of 1954, which is found at 50 U.S.C. §842, and reads as follows:

"The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession, thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have

heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated . . . ." 50 U.S.C. §842.

Congress began the Act with a finding and declaration of fact, which is important, and reads, in part, as follows:

"Section 841 findings and declaration of fact . . . The congress finds and declares that the Communist party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges according to political parties, but denying to all others the liberties guaranteed by the constitution * * *. Unlike members of political parties, members of the Communist party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members * * *." 50 U.S.C. §841.

The statute here serves primarily to insure the citizens of this State and Nation protection from the danger of electing a member of a subversive group such as the Communist Party to any governmental office. The necessity of such legislative safeguards is obvious.

Official Opinion No. 11

Your attention is also directed to 18 U.S.C. §2385, which is commonly referred to as the "Smith Act," and provides, in part, as follows:

> "SEC. 2.(a) It shall be unlawful for any person—(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

Accordingly, in knowingly placing the Communist Party on the Indiana ballot, those state officials who attempt to do so would violate the Indiana law, the Federal *Communist Control Act*, and the Federal *Smith Act*.

The leading Federal case in point is *Dennis* v. *United States* (1950), 341 U.S. 494, in which the Supreme Court of the United States upheld the convictions of persons who were found to have organized and aided the Communist

Party of the United States of America, as violative of the Smith Act. Justice Vinson, in the majority opinion held:

> "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed attack, it must follow that no subordinate value can be protected." 341 U.S. 494, at p. 509, and
>
> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." 341 U.S. 494, at p. 509.

Also, in that case:

> "The Chief Justice accepted the findings of the Second Circuit Court of Appeals, U.S. v. Dennis, 183 F. 2d, 201, that 'the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by members of the Party; that the literature of the Party and the statements and activities of its leaders * * * advocate, and the general goal of the Party was, during

the period in question, to achieve a successful overthrow of the existing order by force and violence.' Concurring, Mr. Justice Frankfurter concluded: 'The Communist Party was not designed by these defendants as an ordinary political party. * * * It (the jury) found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherence and as a policy to be translated into action.' Mr. Justice Jackson, concurring in the same case, observed that 'unless we are to hold our Government captive in a judge-made verbal trip, we must approach the problem of a well-organized, nation-wide conspiracy * * * The Communist Party realistically is a state within a state, an authoritarian dictatorship within a Republic.'"

CONCLUSION

It is, therefore, my Official Opinion that the provisions and requirements of IC 1971, 3-1-11-12, as found at Burns' Ind. Stat. Ann. Section 29-3812 (1969 Repl.) are currently valid and enforceable, and prohibit from appearing on the ballot the name of any political candidates who, or parties whose officers, refuse to sign the affidavit required by that statute.

The Indiana law recited in the foregoing analysis clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government or carries on a program in any way affiliated with a foreign government or related to any political group within any foreign government.

Furthermore, because of the nature and avowed goals of the Communist Party, the United States Congress and the Supreme Court of the United States have declared that such an organization is not a political party in the same sense of the word as an indigenous political party in a representative democracy. Therefore, the Communist Party would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit because that would be an obvious perjury in view of the Communists' stated purposes. And those Indiana officials who would be responsible for placing the Communist Party on the ballot could be subject to Federal criminal prosecution as well under the *Smith Act* and the *Communist Control Act*.

There is no constitutional or common-sense requirement for a free state to fertilize the seeds of its own destruction.

Yours truly,

THEODORE L. SENDAK
Attorney General of Indiana

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SUPREME COURT, U. S.

FILED
FEB 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, Gus Hall, Jarvis Tyner, Simon Boorda, Jesse Reece, Mike Bayer, and Ruth Norrick, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

-v.-

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; Karl J. Stipher and Thurman DeMoss, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

On appeal from the United States District Court for the Northern District of Indiana, Hammond Division

MOTION TO DISMISS OR AFFIRM

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, Gus Hall, Jarvis Tyner, Simon Boorda, Jesse Reece, Mike Bayer, and Ruth Norrick, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

-v.-

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; Karl J. Stipher and Thurman DeMoss, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

On appeal from the United States District Court for the Northern District of Indiana, Hammond Division

MOTION TO DISMISS OR AFFIRM

Appellees (hereafter referred to as Election Board) respectfully move the Court to dismiss this appeal upon the ground that the Notice of Appeal was not timely filed or, in the alternative, to affirm the decision of the United States District Court for the Northern District of Indiana.

QUESTIONS PRESENTED

1. Whether the notice of appeal in this case was timely filed.

2. Whether the challenge to the constitutionality of the "loyalty oath" provisions of Indiana election law presents a question which is so substantial as to require further argument.

STATEMENT OF THE CASE

The Election Board does not accept the Statement of the Case set out in the Jurisdictional Statement.

Indiana law requires that a group seeking a place on the ballot as a political party must file with the Election Board petitions bearing signatures of a prescribed number of registered voters along with a prescribed affidavit. The affidavit, signed by the officers of the party, must state that the party

> "does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." Indiana Code of 1971 (I.C. 1971), 3-1-11-12.

Appellants (hereafter referred to as the Communists) tendered petitions but failed to tender the required affidavit. The Election Board therefore refused to accept the petitions. The Communists then filed suit, alleging the unconstitutionality of the affidavit requirement, in the United States District Court for the Northern District of Indiana, Hammond Division. The Complaint was filed on August 30, 1972, and an amended complaint was filed on September 8, 1972.

A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. A hearing was held on September 28,

1972, at which this case was consolidated for hearing and decision with the suits of two other groups which had been denied a place on the ballot for noncompliance with the affidavit requirement. These groups are the Indiana Peace and Freedom Party and the Indiana American Independent Party, Inc.

The District Court's Memorandum and Order was handed down that same day. The affidavit requirement was held to be severable. The first portion, providing "that it does not advocate the overthrow of local, state or national government by force or violence," was held constitutional, while the remainder was held unconstitutional.[1] The Election Board was ordered to accept from the Communists an affidavit meeting the requirements of the part of the statute held constitutional at any time prior to 2:00 P.M. on September 29, 1972. (Jur. Stat. pp. 2a-4a).

An affidavit was filed, but it was rejected as not in proper form because it attached a limiting definition on the term "advocate." (Jur. Stat. p. 8a). The Communists then filed with the District Court a Petition for Mandate to Enforce the Prior Order of the Court. That petition was denied on October 4, 1972, the District Court holding that the "Election Board acted in accordance with the precise wording of this court's order." (Jur. Stat. p. 5a).

On October 10, 1972, the Communists filed both a Notice of Appeal and a Motion to Amend. On October 17, 1972, they filed a Motion to Withdraw Notice of Appeal. On October 31, 1972, the District Court granted the Motion to Withdraw and denied the Motion to Amend. (Jur. Stat. p. 6a). The Communists then filed a second Notice of Appeal on November 29, 1972.[2] (Jur. Stat. p. 7a).

---

[1] The Election Board's appeal from the determination of partial unconstitutionality has been docketed in this Court as Number 72-990.

[2] The Election Board's Notices of Appeal were filed on November 16, 1972. (Jur. Stat., Cause No. 72-990, pp. 5a-7a).

ARGUMENT

I

THE NOTICE OF APPEAL WAS NOT TIMELY FILED

For this appeal to be timely filed, a Notice of Appeal must have been filed within sixty days of the entry of the District Court's Memorandum and Order of September 28, 1972. Rules of the Supreme Court, Rule 11(3), 28 U.S.C. § 2101 (b). That sixty day period would expire on November 27, 1972. The Notice of Appeal was filed on November 29, 1972. (Jur. Stat. p. 7a). Thus the Notice was not timely filed unless for some reason the running of the sixty day period was tolled.

On October 10, 1972, the Communists filed a timely Motion to Amend pursuant to Fed. R. Civ. Pro., Rules 52(b) and 59(e). Such a motion has been held to destroy the finality of the District Court order so as to extend the time for appeal. *Leishman v. Associated Wholesale Electric Company*, 318 U.S. 203 (1943). See *Moore's Federal Practice* §§ 52.11(3) and 59.12(2). The Notice of Appeal was filed within sixty days of the denial of the Motion to Amend.

The complicating factor, though, is that a Notice of Appeal was filed by the Communists on October 10, 1972, the same date as the filing of the Motion to Amend. It is further clear that the filing of a Notice of Appeal divests the District Court of jurisdiction and vests that jurisdiction in the appellate tribunal. *Moore*, § 52.11(1) at pp. 2752-2754. *Fiske v. Wallace*, 115 F.2d 1003 (8 Cir. 1940), cert. den. 314 U.S. 663 (1941).

Some exceptions appear to have been allowed to this rule, but those would not affect this case. For example, one case has held that the filing of a Notice of Appeal by one party would not prevent the filing of a Motion to Amend by the other party. *Elgen Manufacturing Corporation v.*

Ventfabrics, Inc., 314 F.2d 440 (7 Cir. 1963). Some courts have also allowed correction of clerical mistakes under Fed. R. Civ. Pro., Rule 60(a), after the filing of the Notice of Appeal but before docketing. *Kelley v. Bank Building & Equipment Corp.*, 453 F.2d 774 (10 Cir. 1972). None of the exceptions, however, would include the simultaneous filing by the same party of a Notice of Appeal and a Motion to Amend which seeks a substantive change in the findings.

It is therefore necessary to decide the effect of the simultaneous filing of inconsistent motions. It has been stated as a general rule that a motion is abandoned or waived by the filing of an inconsistent motion. 60 C.J.S., "Motions and Orders", § 42. If that rationale is carried over to the filing of simultaneous motions, it might be that neither was effective.

Another question is whether the later withdrawal of the first Notice of Appeal had the effect of giving the Motion to Amend any greater force or effectiveness than it had had before. There appears to be neither authority nor logic for any fiction that jurisdiction can be retroactively vested or divested. Indeed, there could even be a question, if the Notice of Appeal divested the District Court of jurisdiction, whether that court could even rule on the withdrawal.

It is not contended here that the law is clear on this subject; rather, there seems to be silence, doubt and uncertainty. The Election Board submits, however, that the Motion to Amend, filed simultaneously with a Notice of Appeal, was not effective to stay the sixty day period set out in 28 U.S.C. § 2101.

II

THE INDIANA AFFIDAVIT REQUIREMENT IS CONSTITUTIONAL

The language of the affidavit which is required by Indiana law is that the political party, as an entity, "does not advo-

cate the overthrow of local, state or national government by force or violence." Before going to the merits of the allegation of unconstitutionality, certain minor points must be clarified.

Reference is made in the Jurisdictional Statement to Official Opinion No. 11 of the Attorney General of Indiana. The Election Board believes that opinion to contain an accurate statement of the law. The Jurisdictional Statement, however, refers to it as though the opinion itself were the law. Under Indiana law, an Attorney-General Opinion does not have the force of law. I.C. 1971, 4-6-2-5, as found in Ind. Ann. Stat. (Burns 1964 Repl.) § 49-1908; *State ex rel. Lynch Coal Operators Reciprocal Association v. McMahan*, 194 Ind. 151 (1924).

The Jurisdictional Statement (at p. 13) also attempts to transmute this question of civil law into one of criminal law by reference to the mention in Official Opinion No. 11 of the possibility of perjury. (Indiana law requires the Election Board to investigate the veracity of the affidavit to the extent it shall find necessary. I.C. 1971, 3-1-11-12, supra, set out at Jur. Stat. p. 4). Under Indiana law, the Attorney General does not have general criminal jurisdiction or the power to institute criminal proceedings. That power is vested by law in the local prosecuting attorney. I.C. 1971, 35-1-15-21, 35-1-16-1 and 35-1-16-10, as found in Ind. Ann. Stat. (Burns 1956 Repl.) §§ 9-824, 9-901 and 9-909. The sole issue in this case is that of the statute requiring the affidavit.

The Communists attempted to file an affidavit which limited the scope of the statutory language by reference to the case of *Yates v. United States*, 354 U.S. 298 (1957). The refusal of that particular limitation is then assumed to be an adoption of the broadest possible scope of the statutory language. That assumption does not follow, however, since the particular standard of limitation suggested has been held inapplicable to cases like the matter at bar.

Yates was a criminal case in which the issue was the sufficiency of the instructions to the jury. *Yates* was held inapplicable to a merely regulatory statute in *Communist Party v. Control Board*, 367 U.S. 1 at 56 (1961). Refusal of an inappropriate standard is certainly not erroneous. The case of *State ex rel. Socialist Labor Party v. State Election Board*, 251 Ind. 260 (1968), cited in the Jurisdictional Statement at p. 14, does not deal with the scope of the statutory language in question, but does hold that strict compliance with the statutory requirement is necessary.

This Court has recently given consideration to the constitutionality of such "loyalty oaths." *Cole v. Richardson*, 405 U.S. 676 (1972). The oath under consideration there had two parts. The first was a requirement to uphold and defend the Constitution. That requirement was upheld as clearly analogous to oaths required by the Constitution itself.

The second part was a requirement to "oppose the overthrow of the government of the United States or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." That clause was also upheld for the reason that it was merely the converse of the first and did not expand the obligation of the oath. It was pointed out that the oath did not require any affirmative action, but dealt with a state of mind. A part of the requirement to uphold and defend the Constitution is the requirement of opposing its overthrow by force or violence.

The issue which is then presented by this case is whether one may advocate, if only as a matter of abstract doctrine, that which he has the constitutional duty to oppose! It may be that, by means of some "verbal calesthenics" such a result may be reached, but this Court in *Cole v. Richardson* rejected such antics.

As a further reason for affirmance, it is noted that the case falls squarely within the scope of the Communist Control Act of 1954, which provides that:

> "The Communist Part of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . ." 50 U.S.C. § 842.

That the Communist Party of Indiana is a part of the Communist Party of the United States is clearly established, since the Communists themselves so alleged in their Complaint. It is clear that the judgment of the District Court in this cause was proper.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal for failure to file a timely notice of appeal or, in the alternative, affirm the decision of the United States District Court for the Northern District of Indiana.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, individually and as members of the Indiana State Election Board; and the INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

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IN THE

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OCTOBER TERM, 1972

No. 72-1040

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Appellants,

—v.—

EDGAR D. WHITCOMB, individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, individually and as members of the Indiana State Election Board; and the INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLANTS

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and U.S. Const. Art. I, §10; Art. II, §1; Art. VI, Clause 2; Amendment I and Amendment XIV. Jurisdiction was based on the above provisions and on 28 U.S.C. §§1331,

1343, 2201, 2202, 2281, and 2284. The three-judge district court was asked to declare invalid and enjoin enforcement of Ind. Ann. Stat. §29-3812. The Memorandum and Order of the three-judge court was entered on September 28, 1972; appellees' Verified Motion to Reconsider and to Stay and appellants' Petition for Mandate to Enforce the Prior Order of the Court were denied on October 4, 1972; appellants' Motion to Amend was denied on October 31, 1972; and appellants' Notice of Appeal was filed in the district court on November 29, 1972.[1] The Jurisdictional Statement was filed on January 26, 1973. On March 19, 1973 consideration of the question of jurisdiction was postponed to the hearing on the merits. The jurisdiction of this Court is invoked under 28 U.S.C. §1253. Cases supporting jurisdiction include *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972).

Opinions and Orders

The memorandum and orders of the three-judge district court are unreported. They are set out in the Appendix to the Jurisdictional Statement at pp. 1a-6a.[2] Decisions on Applications to this Court for stays are reported at 93 S. Ct. 16 and 93 S. Ct. 28.

---

[1] Appellees in the instant case filed a Jurisdictional Statement also appealing the decision below on January 13, 1973. This Court summarily affirmed the portion of the district court decision thus appealed from in *Whitcomb* v. *Communist Party of Indiana,* 36 L. Ed.2d 173 (1973).

[2] References to the Appendix are abbreviated App. pp. ——; references to the Jurisdictional Statement are abbreviated J.S. pp. ——; references to the Record are abbreviated R. pp. ——; references to the Appendix to this brief are abbreviated pp. ——, *infra.*

Statute Involved

The statute in controversy in this case is Ind. Ann. Stat. §29-3812 which reads as follows:

> 29-3812. *Elections—Ballots—Certain political parties barred—Doctrine and purpose of party—Investigation.* —No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act (chs. 28-60 of this title), or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any

foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed new party and the expense of such investigation by the state election board shall be paid out of the general funds of the state treasury not otherwise appropriated, provided the amount of such appropriation shall not exceed five hundred dollars ($500); and the expense of the investigation by the county election board shall be paid out of the funds in the treasury, not otherwise appropriated, provided the amount of such appropriation shall not exceed three hundred dollars ($300), and if the board is of the opinion that such existing or proposed new party advocates doctrines which are in violation of the provisions of this act (chs. 28-60 of this title), or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot.

Questions Presented

1. Whether the appeal in this case was timely filed.

2. Whether the United States Constitution precludes the States from conditioning access to the ballot upon the making of any kind of loyalty oath.

3. Whether the United States Constitution precludes the States from conditioning access to the ballot in a presidential and vice presidential election upon the making of an oath in any way different from the oath of office prescribed in Article II, §1, or in any other election upon the making of an oath that exceeds the oath "to support this Constitution" directed in Article VI, cl. 3.

4. Whether a state statute that conditions access to the ballot upon a political party's making an oath "that it does not advocate the overthrow of local, state or national government by force or violence" is unconstitutionally broad and vague under the First and Fourteenth Amendments.

5. Whether the Communist Control Act of 1954 unconstitutionally requires or permits the State of Indiana to condition access to the ballot on a political party's making an oath "that it does not advocate the overthrow of local, state or national government by force or violence."

Statement of the Case

This is an appeal from a decision of a three-judge federal district court that upheld a part of an Indiana statute requiring a political party to file a "loyalty oath" as a condition precedent to placing any of its candidates on any public election ballot. As a result of that decision, the appellants were barred from participating in the November 1972 presidential election. They seek review of the decision below in order to guarantee their future exercise of their constitutional rights.

The appellants are the Communist Party of Indiana, a new political party in Indiana seeking a position on the Indiana Ballot; Gus Hall and Jarvis Tyner, the Party's candidates in 1972 for President and Vice President of the United States, respectively, who intend to seek office in the future; Simon Boorda, Jesse Reece, and Mike Bayer, officers of the Communist Party of Indiana who desire that the Party appear on the Indiana Ballot in future local, state and federal elections; and Ruth Norrick, a registered voter in Lake County, Indiana, who, on behalf of all qualified voters similarly situated, desires that the Party and its candidates be placed upon the Indiana Ballot in future elections, in order that she and the class she represents may be able to vote for such candidates. The appellees are Edgar D. Whitcomb, Karl J. Stipher and Thurman DeMoss, individually and together as the Indiana State Election Board. The appellees, acting on behalf of the State Election Board must certify all new political parties before they may be placed upon the Indiana Ballot. (App. pp. 10a-13a, 18a-19a, 26a-27a.)

Ind. Ann. Stat. §29-3812 requires a newly-organized political party, as a condition for placing its candidates on the ballot, to file an affidavit

> under oath, that it does not advocate the overthrow of local, state, or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government.

The Communist Party of Indiana presented valid petitions for inclusion on the Indiana ballot, but was denied a place on the ballot by the Indiana State Election Board for failure to submit the required affidavit. The Election Board relied on the words of the statute and on Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972, and prepared especially to analyze the statutory requirement in light of the Communist Party's expected submission of petitions.[3] Because of their belief that the affidavit requirement was unconstitutional the appellants filed suit in the United States District Court for the Northern District of Indiana, requesting the convening of a three-judge court, the issuance of an injunction, and a declaratory order that Ind. Ann. Stat. §29-3812 was unconstitutional. (The amended complaint is found at App. pp. 10a-20a.)

On September 28, 1972, a three-judge court conducted a hearing. At this hearing actions were also heard involving the American Independent Party and the Indiana Peace and Freedom Party, which had also been refused certifica-

[3] App. p. 22a. The Opinion of the Attorney General is set out at J.S. pp. 9a-19a.

tion because they filed "improper" disclaimer affidavits. The Memorandum and Order handed down that same day stated in part:

> We have concluded that the loyalty oath, so-called, contained in Ind. Ann. Stat. 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing "that it does not advocate the overthrow of local, state or national government by force or violence," is constitutional and hence enforceable by Indiana. That portion of the statute and oath providing "and that it is not affiliated with and does not cooperate with or [sic] have any relations [sic] with any foreign government or any political party, organization or group or individual [sic] of any foreign government" is unconstitutional as vague and overbroad and therefore unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and hence may not be required. (J.S. pp. 2a-3a.)

The district court directed the Indiana State Election Board to accept affidavits from the three organizations if their form complied with the court's decision.

Thereafter the affidavits of the Indiana Peace and Freedom Party and the Indiana American Independent Party were accepted and these parties were placed on the ballot. The Communist Party, under continued protest that the Indiana statute was unconstitutional on its face, made an effort to comply with the court's opinion to assure itself and its candidates a ballot position in 1972.

Because the appellant party is at the very least constitutionally entitled to engage in advocacy of overthrow of

government that is not related to imminent action, and because Official Opinion No. 11 of the State Attorney General stated that it "would be an obvious perjury" if the officers of the Communist Party should sign an affidavit pursuant to Ind. Ann. Stat. §29-3812 (J.S. p. 19a), the officers of the Communist Party submitted an affidavit that the Party does not:

> . . . advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (App. p. 34a.)

This affidavit was submitted on September 29, 1972 at which time the Election Board by a two-to-one vote refused to certify the Communist Party on the ballot for the November, 1972 election. The reasoning of the appellees, as expressed to the appellants at this session, was that the term "advocate," as required by Ind. Ann. Stat. §29-3812, includes the advocacy and teaching of abstract ideas, beliefs, and principles divorced from action. (App. pp. 31a-32a.)

On October 3, 1972 the appellants filed in district court a Petition for Mandate to Enforce the Prior Order of the Court (App. pp. 31a-35a). Also on October 3rd, the appellees filed a Verified Motion to Reconsider and for Stay, presumably pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure (pp. 1a-3a, *infra*). On October 4, 1972 the district court denied the appellants' Petition and dismissed the appellees' Motion (J.S. p. 5a).

On October 10, 1972 the appellants, pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, filed a Motion to Amend in the district court (App. pp. 36a-37a). Simultaneously, pursuant to 28 U.S.C. §1253, the appellants filed a Notice of Appeal from that portion of the district court opinion upholding part of Ind. Ann. Stat. §29-3812 as constitutional (App. p. 38a).

On October 17, 1972 the appellants filed a Motion to Withdraw Notice of Appeal (App. pp. 39a-40a) "until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972." On October 31, 1972 the district court granted the appellants' Motion to Withdraw Notice of Appeal and denied its Motion to Amend (J.S. p. 6a).

On November 16, 1972, pursuant to 28 U.S.C. §1253, the appellees filed a notice of appeal from that portion of the district court opinion finding a part of Ind. Ann. Stat. §29-3812 unconstitutional (R. pp. 132-135). In that appeal the decision below was summarily affirmed. *Whitcomb* v. *Communist Party of Indiana,* 36 L. Ed.2d 173 (1973).

On November 29, 1972 the appellants filed a notice of appeal from that portion of the District Court upholding the constitutionality of a part of Ind. Ann. Stat. §29-3812 (J.S. p. 7a).[4]

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[4] Both sides also had attempted to secure emergency relief from this Court.

On September 29, 1972 the appellees filed a motion entitled "Emergency Application for Stay of Order of the United States District Court for the Northern District of Indiana, Hammond Division," No. A-370. It sought relief based on a challenge, rejected by the district court, to the validity of the petitions filed with the Election Board.

On October 4, 1972 the appellants filed a Cross Motion to Petition for Mandate to Enforce the Prior Order of the United States

Summary of Argument

This case is now properly before the Court. Because the relief originally sought included placing the Communist Party's candidates on the November 1972 Indiana ballot, this case has been characterized by procedural steps on both sides made under the pressure of approaching deadlines.

Various motions made after the original entry of the district court's Memorandum and Order of September 28, 1972 seemed straightforward and correct when made. Now, however, the appellees claim that actions both by the appellants and the district court were incorrect, with the result that Notice of Appeal was in actuality filed two days late. But analyzing the question in any of several ways, demonstrates that this appeal was timely filed and that the Court has jurisdiction. It is clear that various motions on both sides destroyed the finality of the September 28th judgment and lengthened the time for appeal.

The Communist Party's right of access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of the appellant candidates. *Williams* v. *Rhodes,* 393 U.S. 23 (1968). The First Amendment's protection indisputably extends as well to the individual voter-appellants. *Reynolds* v. *Sims,* 377 U.S.

District Court. Its purpose was similar to the Petition for Mandate to Enforce the Prior Order of the Court filed in the district court, set out at App. pp. 31a-35a.

The appellees' Petition and appellants' Cross Motion were denied by this Court on October 5, 1972, 93 S. Ct. 28.

On October 6, 1972 the appellants filed an Emergency Application for Stay of Order of the United States District Court for the Northern District of Indiana, Hammond Division, No. A-378. This is described by Mr. Justice Rehnquist in his opinion accompanying his denial of the motion that same day, 93 S. Ct. 16.

533 (1964). Nothing in the Constitution (which speaks of oaths of office, not candidacy oaths) or in logic justifies the substantive restriction on basic First Amendment rights presented by the Indiana political party loyalty oath.

If any oath can validly be applied to candidacy for federal offices, such oath can be no broader than that required by the United States Constitution. It is firmly established that the Constitution's enumerated qualifications for federal offices are exclusive, beyond the power of the state to add to or subtract from. The additional qualification, imposed by Indiana in the form of a candidacy oath, cannot stand.

The Indiana oath is also violative of the First and Fourteenth Amendments because it is unconstitutionally vague and overbroad. The vagueness of this negative oath is evident on its face as there is no clarification of the crucial word "advocacy". This litigation, however, has served to clarify the statute and it now appears that Indiana intends the word "advocacy" to include advocacy of abstract doctrine not related to imminent lawless action. Thus construed, the statute conditions fundamental rights on the sacrifice of constitutionally protected advocacy, *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Since this Court must accept the Indiana interpretation of the law, the statute cannot be saved by "rewriting," and must fall as unconstitutional.

Finally, it is clear that the Communist Control Act of 1954 cannot justify the Indiana statute or serve as an impediment to the Communist Party's attack on the statute. It has not been shown that the Communist Control Act is even applicable to the instant case. Furthermore, there is enough evidence from various court opinions to indicate that the Communist Control Act is unconstitutional.

ARGUMENT

I.

The appeal was timely filed.

The appellees contend that this appeal is not timely because a notice of appeal was not filed by the appellants "within sixty days of the entry of the District Court's Memorandum and Order of September 28, 1972." (Motion to Affirm or Dismiss, p. 4.) They are completely mistaken.

The appellees' mistake probably results from confusion about the multiplicity of proceedings that followed the district court hearing and decision of September 28, 1972. From its inception, this case has been shaped by the various deadlines and time considerations that characterize elections. The appellants' procedural steps were taken for the primary purpose of securing the Communist Party and its candidates positions on the ballot for the November, 1972 presidential election. The appellees' actions were taken for just the opposite purpose. Both sides requested reconsideration or amendment of the judgment; both sides appealed for and were denied emergency relief from both this Court and the district court; both sides appealed the district court's judgment to this Court.

In view of the multiplicity of proceedings, the appellees' confusion about the timeliness of this appeal is understandable. A clear recitation of the proceedings, however, should dispel it.

(1) *September 28, 1972*: The district court's Memorandum and Order was filed.

(2) *October 3, 1972*: The appellants filed a timely Petition for Mandate to Enforce the Prior Order of the Court (App. pp. 31a-35a), and the appellees filed a timely Verified Motion to Reconsider and for Stay (pp. 1a-3a, *infra*). The appellees' Motion clearly was a Motion for Amendment or New Trial under Rules 52(b) and 59 of the Federal Rules of Civil Procedure. It specifically requested the district court "to reconsider its ruling . . . and in the alternative . . . to clarify its said ruling. . . . " (pp. 1a-3a, *infra*).

(3) *October 4, 1972*: The district court denied appellants' Petition and dismissed appellees' Motion (J.S. p. 5a).

(4) *October 10, 1972*: Simultaneously, as appears from the time of the filing stamps (R. pp. 111, 119), the appellants filed a Motion to Amend, pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, and a Notice of Appeal. At the time of filing the Notice of Appeal, the appellants were hoping to obtain emergency relief from this Court to place their candidates on the Indiana ballot for the November 1972 election. Subsequent research convinced the appellants that no emergency relief was available from this Court and the purpose of filing the Notice of Appeal in order to vest jurisdiction in this Court was thus obviated. (App. pp. 39a-40a.)

(5) *October 17, 1972*: The appellants filed a Motion to Withdraw Notice of Appeal in the district court, pursuant to Supreme Court Rule 14(1) which allows the lower court to "dismiss the appeal upon motion and notice by the appellant." The Motion specifically requested leave to withdraw the "Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend . . . [and] so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972." (App. pp. 39a-40a.)

(6) *October 31, 1972*: The district court granted the appellants' Motion to Withdraw Notice of Appeal and denied their Motion to Amend.

(7) *November 29, 1972*: A new Notice of Appeal was filed by the appellants.

Title 28 U.S.C. §2101 allows 60 days from the date of final judgment to file a Notice of Appeal in a case like the instant one. The filing of a timely Rule 52(b) Motion to Amend or a timely Rule 59 Motion for New Trial destroys the finality of a district court's order, *Leishman* v. *Associated Wholesale Electric Company*, 318 U.S. 203 (1943), and the 60-day period "runs from the date of the order overruling the motion." *United States* v. *Adams*, 383 U.S. 39, 41 n. 1 (1966). See 9 *Moore's Federal Practice* (2d ed.) ¶201.03 [2.-2], pp. 511-3 (1973). Thus, unless the district court's actions were improper, the second Notice of Appeal, clearly filed within sixty days of the denial of the appellees' Verified Motion to Reconsider and the appellants' Motion to Amend, was timely.

The appellees' contention seems to be that the simultaneous filing of the appellants' Motion to Amend and their Notice to Appeal, on October 10th, rendered the Motion to Amend a nullity; therefore the district court's ruling on that motion was a nullity; since there never was a valid Motion to Amend, the sixty day appeal period ran uninterrupted from September 28, 1972. Because appellants' first Notice of Appeal was properly withdrawn on October 31st and their second Notice of Appeal, filed on November 29th, was filed more than sixty days after final judgment, this appeal is not timely. (Motion to Dismiss or Affirm, pp. 4-5.) No case is cited which supports this analysis. In *Fiske* v. *Wallace*, 115 F.2d 1003 (8th Cir. 1940), *cert. denied*, 314 U.S. 663 (1941), cited by the appellees at p. 4

of their Motion to Dismiss or Affirm, the Notice of Appeal was filed two hours before another motion was filed by the opposing party. The circuit court ruled that the trial court had been divested of jurisdiction to consider the subsequent motion. But see *Elgen Manufacturing Corporation* v. *Vertfabrics, Inc.*, 314 F.2d 440 (7th Cir. 1963), reaching an apparently contrary result.

There is no need in this appeal for the Court to resolve the question whether the appellants' simultaneous filing of a Motion to Amend and a Notice of Appeal on October 10, 1972 rendered nullities of both or either of them. Regardless of the answer, the appeal was timely.

There are three possible dates upon which final judgment occurred: September 28, 1972, when the district court rendered its Memorandum and Order (J.S. pp. 1a-4a); October 4, 1972, when the district court dismissed as moot the appellees' timely Verified Motion to Reconsider (J.S. p. 5a); and October 31, 1972, when the district court denied appellants' Motion to Amend (J.S. p. 6a). If this Court were to decide that the date of final judgment were either October 4th or October 31st, the appeal was, of necessity, timely filed and docketed. Even if the date of September 28th were selected, the appeal was timely filed, although it may have been docketed late. However, timely docketing is not jurisdictional, and this Court should entertain the appeal.

If both the Motion and the Notice are nullities, the November 29th Notice of Appeal was timely. No Notice of Appeal was interposed to deny the district court jurisdiction between the date of the initial judgment on September 28th and the district court's October 4th denial of the appellees' timely Verified Motion to Reconsider. The appellees' motion, questioning the correctness of the district

court's judgment, was functionally the equivalent of a Rule 59(e) motion. Therefore the finality of the September 28th judgment was destroyed. See 9 *Moore's Federal Practice* (2d ed.), ¶204.12[1], p. 951 (1973); *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716 (3d Cir. 1962); *Woodham* v. *American Cytoscope Company of Pelham, N.Y.*, 335 F.2d 551 (5th Cir. 1964). At the very earliest, then, October 4th and not September 28th was the date of final judgment, and the November 29th Notice of Appeal was filed within the requisite sixty day period.

If only the October 10th Notice of Appeal is a nullity, the October 10th Motion to Amend certainly suspends the appeal period. The appellees concede that it was timely made under Rules 52(b) and 59(e) (Motion to Dismiss or Affirm, p. 4). Indeed, it was made just six days after the district court disposed of the appellees' timely Verified Motion to Reconsider. And regardless of whether the date of final judgment is taken to be October 4th, when the appellees' motion was dismissed, or October 31st, when the appellants' motion was denied, the November 29th Notice of Appeal was timely.

If both the Motion and the Notice are viable, no difficulty at all is encountered. Supreme Court Rule 14(1) permitted the appellants to make the October 17th Motion to Withdraw Notice of Appeal and the district court to grant that motion on October 31st. And whether the date of final judgment is taken to be October 4th or October 31st, the November 29th Notice of Appeal again was timely.

The same happy result occurs if only the October 10th Notice of Appeal is viable and the Motion to Amend is not. The Notice was still probably vitiated by the district

court's granting of the Motion to Withdraw Notice of Appeal on October 31st. It is also possible that the October 10th Motion to Amend was resurrected by the October 17th Motion to Withdraw the Notice of Appeal, which specifically was predicated upon the appellants' expectation that they had filed a viable Motion to Amend (App. pp. 39a-40a). The date of final judgment would then be October 31st. If the October 10th Motion remained a nullity, the date of final judgment was October 4th. The November 29th Notice of Appeal was timely in either event.

Thus, as long as it is clear that the district court's denial of appellees' timely Verified Motion to Reconsider postponed the date of final judgment to a date no earlier than October 4th, it is unnecessary for this Court to pass upon the effect of appellants' simultaneous filing on October 10th of the Motion to Amend and the first Notice of Appeal. But even if the Court were to conclude that the action on the appellees' Verified Motion to Reconsider did not postpone the date of final judgment, this appeal would still be timely. The better authority indicates that question should be answered in a way that sustains this Court's jurisdiction.

First, the Motion to Amend should be found to be viable. The district court should be taken to have made the assumption that the Motion to Amend was filed first. Therefore, the appellants' first Notice of Appeal was prematurely filed and ineffective to nullify the Motion to Amend. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944), *rehearing denied*, 323 U.S. 818 (1945), holding that an appeal, while substantive motions to amend the judgment are pending, is premature and therefore null.

In the absence of a showing to the contrary, the presumption is that the trial court is aware of the law and acted accordingly. "Error is not to be presumed but must be affirmatively shown." 7 *Moore's Federal Practice* (2d ed.), ¶61.11, pp. 61-43 to 61-44 (1972). And when the district court eventually denied the Motion to Amend it gave no indication that the Motion itself was improper or that the court lacked jurisdiction. Under this approach, the final judgment, of course, was entered on October 31st.

Second, even if it were decided that the district court had no power to consider appellants' Motion to Amend, it does not follow that its action was ineffective to extend the time period for filing the Notice of Appeal. This point has been made in several decisions of this Court involving the time for appealing from the district courts to the courts of appeals. In *Bowman* v. *Loperena,* 311 U.S. 262 (1940), this Court ruled that untimely (therefore improper) motions, if entertained by the trial court, lengthened the time period for appeal.

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal was from the date thereof. 311 U.S. at 266.

Also instructive are the cases of *Thompson* v. *Immigration & Naturalization Service,* 375 U.S. 384 (1964) and *Wolf-*

sohn v. *Hankin*, 376 U.S. 203 (1964). These cases have been explained in the treatises:

> But it must be stressed that *Thompson* and *Wolfsohn* hold only that if, at a time when he may appeal, a party is misled by the words or conduct of the district court into believing that he need not then appeal, he ought not to lose his right to appeal by reason of the mistake of the district court. 9 *Moore's Federal Practice* (2d ed.), ¶204.12[2], p. 958 (1973).

> When employed in the context of an untimely appeal, the unique circumstances concept is based on a theory similar to estoppel. The Supreme Court seems to have concluded that a party ought not be denied an opportunity to appeal because of his failure to file a timely appeal when that failure resulted from reliance on action taken by the district court that generated a reasonable belief that an appeal could be initiated at a later date. 4 Wright & Miller, *Federal Practice and Procedure*, Civil §1168, p. 639 (1969).

See also, *Pierre* v. *Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); *Motteler* v. *J.A. Jones Construction Company*, 447 F.2d 954 (7th Cir. 1971).

Third, if the Motion to Amend and the district court's ruling denying it were null and ineffective to lengthen the period of appeal, it remains true that the original notice of appeal filed October 10, 1972 was timely, and jurisdiction in this Court was vested as of that date. The Motion to Withdraw Notice of Appeal, filed October 17, 1972, was improper because it was made and treated by the district court under the assumption that the Motion to Amend was still alive. The introductory paragraph of the Motion

to Withdraw states that "plaintiffs . . . request this honorable court for leave to withdraw their Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972 . . ." (App. p. 39a.) Paragraph 6 states: "That therefore plaintiffs desire to withdraw their Notice of Appeal so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972." (App. p. 40a.) The district court also assumed the continuing validity of the Motion to Amend. When, on October 31st, it granted the Motion to Withdraw the Notice of Appeal, it also specifically ruled on the Motion to Amend, denying it. (J.S. p. 6a.)

The appellees' argument that the Motion to Amend was void *ab initio* exposes the impropriety of the Motion to Withdraw Notice of Appeal, as well as the district court's impropriety in granting that motion. Hence, if the Motion to Amend was a nullity, both of these subsequent acts should also be treated as nullities. The original October 10th Notice of Appeal should remain in effect.

Under this analysis the Jurisdictional Statement must be taken to have been late in reaching this Court. Supreme Court Rules 13 and 14. Late docketing, however, is not a jurisdictional defect, as the Court made clear in *Johnson* v. *Florida,* 391 U.S. 596, 598 n. (1968) (appeal docketed 56 days late still entertained), and *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.,* 385 U.S. 32 (1966). In the *Pittsburgh Towing Co.* case, the appeal was timely but docketing was 22 days late. The Court commented on the unsatisfactory explanation for the delay and went on to say:

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence. 385 U.S. at 32-3.

The instant case is a clear example of one meriting the "indulgence" of the Court. If the case was docketed late, the late docketing sprang from misapprehensions by the parties and the lower court. Letting the appellants suffer the harsh results of dismissal would be unfair. Notably, the appellees were aware of the series of motions made by the appellants in this case. The appellees made no jurisdictional or procedural objections at the time the motions were made. Nothing in the record indicates the appellees even felt that any of the district court's actions were procedurally improper when they were made. To this date, the appellees have not shown and cannot show that they have been prejudiced in any way by allegedly improper actions of the district court or by any failure to timely docket this appeal.

The foregoing recital of facts and arguments may make the issue of timeliness appear complex. In reality no such complexities were evident to the parties or the court below. There exists no logical reason why procedural difficulties, real or imagined, should prevent this Court from considering the important constitutional issues which this case presents.

II.

The states may not constitutionally condition access to the ballot on any kind of loyalty oath.

The Communist Party's right to qualify as a new political party and to gain access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of Appellant candidates.

> [T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms . . . The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. *Williams* v. *Rhodes,* 393 U.S. 23, 30, 31 (1968).

The First Amendment's protection of the rights of the individual voter-appellants must also be considered. As this Court has said: " . . . the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock* v. *Carter,* 405 U.S. 134, 143 (1972). Clearly, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964).

A fundamental principle in our democracy is "that the people should choose whom they please to govern them,"

and "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969).

The electorate should have the unhampered opportunity to cast their votes at the polls for the widest variety of political programs. The act of casting a ballot is the safeguard and the ultimate expression of all constitutional rights. Access to the ballot is integrally related to the First Amendment rights of speech and assembly; the electoral process is often the only viable forum through which novel ideas can be presented effectively to one's constituency. Any attempts by government to limit this fundamental right must necessarily be counterproductive. To deny access to the ballot to any person believed to advocate forceful overthrow of government, sedition, or treason, for example, not only flies in the face of the First Amendment, it is pragmatically unsound. Emerson, *The System of Freedom of Expression*, p. 202 (1970). Any person who might advocate the use of force to seize power does so not because of his attachment to violence as such but as an instrument to achieve his political objectives. If he believes he can achieve those objectives through use of the electoral process, he is less likely to advocate, no less generate, violence. But the more such a person is shut out of a functioning parliamentary system, the more likely will he resort to force or to its advocacy.

It is clear then that any substantive restriction on the fundamental right of access to the ballot can be justified only by the most compelling state interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Indeed, the only permissible substantive restrictions in this area would be those necessary to safeguard the electoral process itself. Cf. *United*

States v. *Classic*, 313 U.S. 299 (1941). Exclusion of a party or a candidate because of political ideology can never be permitted. Such exclusion in no way safeguards the electoral process, it undermines it.

Valid state interests concerning officeholders and the proper functioning of government are important, but they are irrelevant to the electoral process itself and cannot justify infringements of constitutional rights in the electoral process. States must carry out their legitimate purposes by methods that are least restrictive of constitutional rights. E.g., *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). The inescapable conclusion is that whatever valid interests a state may have in regulating who are to be officeholders may be asserted only at the point of actual office-taking.[5]

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[5] The case of *Gerende* v. *Election Board*, 341 U.S. 56 (1951) (per curiam), is not contrary. This Court in *Whitehill* v. *Elkins*, 389 U.S. 54 (1967), held the Maryland statute involved in both cases impermissibly broad and vague on its face and as construed and applied. It pointed out that in *Gerende* the Court had merely "accepted the narrowing construction tendered by the Attorney General during oral argument *so as to avoid the constitutional issue that was argued.*" 389 U.S. at 58 (emphasis supplied). "That construction had not yet been fashioned into an oath or certificate when *Gerende* reached us." *Id.*, at 58. Hence the *Gerende* decision was an exercise of the avoidance doctrine, not a decision on the merits.

This Court is urged to reconsider *Lisker* v. *Kelley*, 315 F. Supp. 777 (M.D. Pa. 1970), *aff'd mem.* 401 U.S. 928 (1971) (Douglas and Brennan, *JJ.*, dissenting; Black, *J.*, recommending dismissal for mootness). That case upheld the right of a state to impose a candidacy oath for state office. The district court, relying primarily on cases upholding oaths in the employment area, apparently was not faced with the argument that the electoral process is a situation demanding different justification for state imposed restrictions. Further, the district court labored under the misapprehension that in *Whitehill* this Court " . . . recognized the viability of *Gerende* . . . " as a decision sustaining candidates' oaths. 315 F. Supp. at 782. This Court, having accepted jurisdiction to hear this case, should consider all constitutional arguments, including those inconsistent with the result reached in *Lisker*.

This conclusion is reflected in the United States Constitution which prescribes requirements for officeholders, not for candidates. Similarly, the presidential oath to "preserve, protect and defend the Constitution of the United States" is to be taken "Before he enter on the Execution of his Office, . . ." not before he is permitted to become a candidate. Art. II, §1, cl. 8.

The constitutional difference between candidacy and office-taking is supported by long practice which has recognized as valid the nomination and election of Congressmen who at the time of their election did not yet meet the age requirement specified in the Constitution. Joseph R. Biden (Democrat of Delaware) is the Senate's current example of this practice. He turned 30 two weeks after the election. *Congressional Quarterly: Weekly Report*, Nov. 11, 1972, p. 2991. Even more relevant has been the permitting of candidacy of individuals who would not meet the age requirement even at the time of inauguration.[6] Furthermore, for the offices of President and Vice President the Constitution clearly anticipates, and thus provides for, the case where the winning candidate does not meet the qualification for the office. Amend. XX, §3. Cf. *Powell* v. *McCormack*, 395 U.S. 486 (1969), where the Court distinguished between exclusion and expulsion from office.

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[6] The supreme example is that of Rush D. Holt, nominated and elected Senator from West Virginia on November 6, 1934. He did not reach thirty till June 19, 1935, after which date he was permitted to take his rightful seat. A challenge to his seating was defeated 62 to 17. The Senate Report prepared for the occasion describes in detail the historical and legal precedents involved. S. Rep. 904, 74th Cong., 1st Sess. (1935).

III.

The Indiana statute is void because it requires an oath broader than the constitutional oaths of office.

Appellants contend that not even the constitutional oath of office may be imposed on mere candidates and their political parties. However, if an oath can validly condition candidacy, especially federal office candidacy, the oath can be no broader than the one prescribed by the Constitution for the office.[7] So in effect held the Court of Appeals of Maryland in *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332, *appeal dismissed,* 340 U.S. 881 (1950), when it ruled that candidates for federal office could not be required to take a state loyalty oath. Time and again courts at all levels have held the requirements enumerated in the Constitution for federal offices are exclusive. Additional requirements imposed by the states beyond those mentioned in the Constitution have been struck down. E.g. *In re O'Connor,* 173 Misc. 419, 17 N.Y.S.2d 758 (Sup. Ct. 1940) (upholding the right of "a leader of the communist party in America" to be on the ballot); *State* v. *Crane,* 65 Wyo. 189 (1948); *State ex rel. Handley* v. *Superior Court of Marion County,* 238 Ind. 421 (1958); *Stack* v. *Adams,* 315 F. Supp. 1295 (three judge court, N.D. Fla. 1970).

In 1807 the House of Representatives voted 89 to 18 to seat William McCreery of Maryland even though he did not satisfy an additional requirement imposed on the office by the State of Maryland. 17 *Annals of Congress* 1237

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[7] *Lisker* v. *Kelley,* 315 F. Supp. 777 (M.D. Pa. 1970), *aff'd mem.* 401 U.S. 928 (1971), clearly has no relevance to this issue as it involved candidates for purely local offices.

(1807). On March 5, 1856 the Senate voted 35 to 8 to seat Lyman Trumbull of Illinois against a challenge that Illinois state law disqualified him from holding the office. The issue was the subject of considerable debate in the Senate. The final vote decisively rejected the idea put forward by a minority that a state could "superadd" qualifications for Senators. *The Congressional Globe,* 34th Cong., 1st Sess., March 3-5, 1856, pp. 547-84 *passim.* This Court has summarized much of this history and lent further force to the proposition that only expressly prescribed Constitutional requirements may be imposed for federal offices in its opinion in *Powell* v. *McCormack,* 395 U.S. 486 (1969).

The oath which the office taker swears is one of the enumerated qualifications for the office. *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332, *appeal dismissed,* 340 U.S. 881 (1950). Thus it is in the same position as the other enumerated qualifications, and is pre-emptive as to any other oaths. In the case of the office of President, the Constitution specifies the words required. Art. II, §1, cl. 8. The other office holders, federal and state, must swear only "to support this Constitution" although the words of the oath are not specified. Art. VI, cl. 3. Congress, however, recognized that the duty of providing the words of the oath lay upon its shoulders and specified them for federal officers in its first public act. An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. 23, June 1, 1789.

Various provisions in the Constitution have been construed to confine exclusive authority on certain subjects to the federal government, even in the absence of specific language. Thus Congress' power over naturalization,[8]

[8] *City of Minneapolis* v. *Reum,* 56 F. 576 (8th Cir. 1893).

bankruptcy,[9] patents and trademarks,[10] coinage,[11] post offices and post roads,[12] to name a few, are exclusive. Similarly Art. II, §1, cl. 8 and Art. VI, cl. 3 of the Constitution confer exclusive jurisdiction in the federal government to prescribe oaths for federal officers; they also preclude the states from imposing oaths as conditions to candidacy. Present exercise of this authority by Congress is exemplified by 2 U.S.C. §§21, *et seq.* Congress' action might well be taken to have "occupied the field" thereby pre-empting any further State regulation. Cf. *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956); *Uphaus* v. *Wyman,* 360 U.S. 72 (1959).

As the states have no right to add or subtract from the enumerated qualifications for office, so too the states have neither the right to add to nor subtract from the words of the oaths specifically called for in the Constitution. There is nothing in *Cole* v. *Richardson,* 405 U.S. 676 (1972) (involving a so-called "positive oath" in an employment context) to support the idea that the Indiana affidavit is "essentially the same" as the oath required by the Constitution. The Indiana affidavit is a negative oath and deals with advocacy; it cannot be equated with an affirmative and simple oath to "uphold and defend" the Constitution. Not after *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961) has this Court sustained any such negative oath. The Indiana affidavit clearly requires an additional oath, and as Chief Justice Vanderbilt of the New Jersey Supreme Court held in reference to the New Jersey Constitu-

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[9] *International Shoe Co.* v. *Pinkus,* 278 U.S. 261 (1929).

[10] *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225 (1964).

[11] *Legal Tender Cases,* 79 U.S. 457 (1871).

[12] *Hoover* v. *McChesny,* 81 F. 472 (Cir. Ct. Kentucky 1897).

tion, there is nothing in the United States Constitution's history or text

> that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered thereby. *Imbrie* v. *Marsh*, 3 N.J. 578, 592, 71 A.2d 352, 360 (1950).

At the very least the Constitution requires Ind. Ann. Stat. §29-3812 to make a distinction between federal and non-federal political offices. Of course, no such distinction is made in the statute; it clearly applies across the board. The constitutional infirmity, just as clearly, cannot be remedied by "interpreting" the affidavit as valid only for state and local offices. The affidavit is demanded of the party itself, not of its individual candidates. Requiring a party to file such an affidavit if it intends to field candidates for local office would only be a less direct method of exercising impermissible control over the party's candidates for federal offices. This Court cannot "rewrite" the Indiana statute to make it applicable to individual candidates, cf. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

IV.

The Indiana statute is unconstitutionally broad and vague in violation of the First and Fourteenth Amendments.

A. *The Indiana Statute Is Unconstitutionally Vague*

The appellants originally attacked the Indiana statute as being unconstitutionally vague. A portion of the statute has already been declared unconstitutional as vague and overbroad. *Whitcomb* v. *Communist Party*, 36 L. Ed.2d 173 (1973). The remaining part requires an affidavit from a political party " . . . that it does not advocate the overthrow of local, state or national government by force or violence . . . " Ind. Ann. Stat. §29-3812.

As the statute is formulated, a new political party finds itself in the classical dilemma of not knowing which of its acts or utterances are forbidden. Against what sort of advocacy is the statute directed? Does one violate the law when he or she speculates in abstract terms about the most hypothetical of cases, or teaches the moral necessity of violent overthrow? At the other end of the spectrum is speech intended to incite immediate violent action against legitimate government. At what point between these two extremes does the statute come into play? As this Court said in *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964):

> We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to "steer far wider of the unlawful

> zone," *Speiser* v. *Randall,* 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked.

See also *Smith* v. *California,* 361 U.S. 147, 151 (1959); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

The dangers inherent in such laws are even greater in this area involving rights of free speech and political organization.

The due process requirement of statutory clarity in this First Amendment area was clearly not met by the ambiguous words of Ind. Ann. Stat. §29-3812, and this was a basis for the Communist Party's original challenge. On its face the statute may still be attacked for impermissible vagueness and appellants do not mean to abandon this argument. As a result of this litigation, however, the statute in question has been better defined. Its vagueness is now clearly overshadowed by its unconstitutional overbreadth.

B. *The Indiana Statute Unconstitutionally Proscribes Advocacy Not Directed to Inciting or Producing Imminent Lawless Action.*

A law is overbroad when, in addition to proscribing acts "which legitimately may be proscribed," it proscribes acts "which may not be proscribed." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967). The overbreadth restrictions of the First Amendment and the due process clause also require the states to carry out their legitimate purposes by methods least restrictive of constitutional rights:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued

> by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

It is in this light that the Indiana statute must be examined.

We must turn to Indiana sources to determine what the advocacy provision encompasses. That the statute as a whole was meant to have extremely broad scope is indicated by the decision of the Indiana Supreme Court in *State ex rel. Socialist Labor Party* v. *State Election Board,* 251 Ind. 260, 241 N.E.2d 69 (1968). See also Indiana Attorney General Official Opinion No. 11, J.S. pp. 9a-19a ("The Indiana law . . . clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government . . . " *Id.* at 18a).

Insight into Ind. Ann. Stat. §29-3812 can also be gained from an overview of legislation in related areas. Indiana has traditionally used a broad brush in dealing with problems of "Criminal Syndicalism" (chapter 13 of the Penal Code, §10-1301 *et seq.*) and "Communism" (chapter 52 of the Penal Code, §10-5201 *et seq.*), e.g. §10-5202 "Public Policy—Extermination of Communism"; §10-5204 "Membership in Communist Party or similar organization unlawful." See also *State* v. *Levitt,* 246 Ind. 275, 203 N.E.2d 821 (1965), upholding the constitutionality of §10-5205, "Unlawful assembly" for the purpose of "advocating or teaching the doctrine" of forcible overthrow of government.

The history of this litigation demonstrates that the statute is patently overbroad. On the day after the dis-

trict court's decision sustaining the portion of the statute in question here, the Communist Party filed its affidavit that it

> does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States,* 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (J.S. p. 8a.)

The Indiana State Election Board rejected the affidavit at a hearing that same day and expressed the view that the term "advocate," as used in Ind. Ann. Stat. §29-3812, includes the advocacy and teaching of abstract ideas, beliefs, and principles divorced from action.

On October 4, 1972 the district court denied the Communist Party's "Petition for Mandate to Enforce the Prior Order of the Court." Thereafter the Communist Party filed a "Motion to Amend," requesting the District Court to declare

> that the portion of Ind. Ann. Stat. §29-3812 providing "that it [the certifying party] does not advocate the overthrow of local, state or national government by force or violence" is constitutional only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine. (App. p. 36a)

In denying the motion on October 31, 1972, the district court in effect reaffirmed that Indiana did not intend its

statute to be read narrowly. Because the statute has such wide scope it is unconstitutionally overbroad.

This Court has had frequent occasion in the past to specify what kind of advocacy is subject to governmental restriction. What has emerged is now quite clear. Only advocacy that is " . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action . . . " may be prohibited. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). See also, *Yates* v. *United States*, 354 U.S. 298, 320 (1957); *Noto* v. *United States*, 367 U.S. 290, 297-8 (1961); *Street* v. *New York*, 394 U.S. 576 (1969).

The principle of the decisions precluding criminal prosecution for engaging in advocacy not imminently inciting lawless conduct precludes the conditioning of statutory rights on overly broad loyalty oaths. E.g. *Cole* v. *Richardson*, 405 U.S. 676 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). See generally, *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971).[13] If a state cannot impose greater restrictions on the First Amendment rights of its legislators than it can on private citizens, *Bond* v. *Floyd*, 385 U.S. 116, 132-3 (1966), it certainly cannot impose such greater restrictions on mere candidates for public office.[14] Appellees have shown nothing inherent in the

[13] Of course the meaningful threat of perjury prosecution made by the Indiana Attorney General may well render moot any possible question of a difference in standards in civil and criminal deprivations. (See J.S., p. 19a.) This Court is expressly conscious of the risks of perjury prosecution in the loyalty oath context. *Baggett* v. *Bullitt*, 377 U.S. 360, 374 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-87 (1961).

[14] The Court's observation that "a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens" (385 U.S. at 135), obviously cannot be taken as a mandate to permit an oath that

electoral process that justifies any restrictions on the participants greater than those permitted on citizens at large. Indeed the electoral situation is one which demands the utmost protection of First Amendment rights of advocacy and merits greatest latitude in determining what is permissible speech.

This Court must accept the repeated Indiana determination of the broad scope of the Indiana statute, cf. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 285 (1961). The law cannot be saved by giving it a different meaning than the one intended, and the one intended is clearly unconstitutionally overbroad. As Professor Thomas I. Emerson has written:

> Qualifications for access to the ballot grounded upon conduct otherwise protected as expression would seem to present the clearest possible case for application of the full protection rule [of the First Amendment]. It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. *The System of Freedom of Expression,* 202 (1970).

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invades First Amendment provinces or indeed one that exceeds the constitutional support oath. It means only that citizens cannot be compelled willy-nilly to execute support oaths.

V.

The Communist Control Act of 1954 is neither applicable to this case nor constitutional.

At several points in this case the issue of the applicability of the Communist Control Act of 1954, 50 U.S.C. §§841 and 842, has been raised. (E.g., App. pp. 24a-25a.)[15] The Act was not specified as one of the grounds relied upon by the Indiana Election Board in denying a place on the ballot to the Communist Party, and it was neither relied upon nor mentioned by the district court in its decision. The appellants continue in their belief that the Communist Control Act has no bearing on this case. Reference to the Act in the appellees' "Motion to Dismiss or Affirm" (p. 8), however, warrants this reply.

This Court has never passed on the constitutionality of the Act, yet unmistakable signs from decisions of other courts point to the Act's unconstitutionality. See *Mitchell* v. *Donovan,* 290 F. Supp. 642, 645 (D. Minn. 1968) (3-judge court) (expressing "grave doubts which exist as to the constitutionality of the Communist Control Act"), 300 F. Supp. 1145 (D. Minn. 1969), *vacated* (for reasons not here relevant) 398 U.S. 427 (1970). The Act has recently been declared unconstitutional by a district court in *Blawis* v.

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[15] The statute reads in part:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . 50 U.S.C. §842.

Bolin, 41 L.W. 2617 (D. Ariz. May 8, 1973), another case of a state's efforts to keep the Communist Party off the ballot. The Act was declared to be a Bill of Attainder and violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment. In *Communist Party* v. *Catherwood*, 367 U.S. 389 (1961), the only decision of this Court dealing with the Act, the Court commented on the vagueness of the law and refused to apply it to the facts of the case. And numerous decisions of this Court have struck down as unconstitutional similar laws not making the crucial distinction between active and non-active membership. E.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). Thus even if this Court finds the Act is applicable to the case at bar, the unconstitutionality of the Act precludes its use to restrict any of the rights of the appellants at issue here.

CONCLUSION

For the reasons stated above, the Court should reverse that portion of the District Court opinion upholding the constitutionality of part of the Indiana affidavit requirement.

Respectfully submitted,

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June 1973

Counsel are indebted to George Schneider of the Columbia University School of Law class of 1974 for his assistance in the preparation of this brief.

APPENDIX

Verified Motion to Reconsider and for Stay

[Filed Oct. 3, 1972]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

[CAPTION OMITTED]

Come now the Defendants, Edgar D. Whitcomb, Governor of the State; Karl J. Stipher and Thurman DeMoss, by Theodore L. Sendak, Attorney General of Indiana, by his deputies, Edward W. Johnson and Thomas R. Neal, and move the Court to reconsider its ruling in the above cause entered on September 28, 1972, and in the alternative move the Court to clarify its said ruling and allege and say:

1. That on the 28th day of September, 1972, this Court, as a three-judge court, entered an order providing that defendants, upon the filing of an affidavit by plaintiff, Communist Party of Indiana, should certify such party and cause their inclusion upon the ballot for the November general election, as shown in Order of this Court as attached hereto as Exhibit "A".

2. Counsel have been informed and believe that such an affidavit has been filed upon this 29th day of September, 1972.

3. That administrative action by defendants must be taken on this 29th day of September, 1972, in order that absentee ballots may be printed before the time required by Indiana law; that the evidence produced at the trial of this cause established that the deadline for the printing of such ballots was September 29, 1972.

4. That the defendants had refused to accept the petitions of plaintiff, Communist Party of Indiana, and consider the validity of them because of the failure to provide the loyalty oath at the time of presentation. That Indiana law requires that such application including [sic] a petition signed by registered voters in a number equal to one-half of one percent of the total voters for the office of Secretary of State in the last preceding general election. That such petitions have never been considered by the defendants to determine the validity of the signatures thereon. That defendants and their counsel have reason to believe that the petitions do not include the required number of valid signatures.

5. Evidence was attempted to be presented to this Court as to the number of valid signatures, which would have shown that there were not sufficient valid signatures. That the Court adjourned its hearing during such testimony before such time that the defendants had rested their case and entered the order which failed to take any notice of this issue. That defendants under Indiana law have a legal duty to perform the function of requiring [sic] into the validity of the signatures on the petition, in the order of this Court mentioned above and the effect of the order of this Court [sic] mentioned above is to preclude defendants from exercising that legal duty.

6. Therefore the order referred to above should be modified by the Court to provide the defendants with the necessary means to inquire into the validity of the signatures referred to in the petitions, or in the alternative the order should be clarified by the Court, reaching the issue of the validity of the signatures, and directing the defendants to inquire into the validity of the signatures as they are required to do under Indiana law, and that the Court stay the effective date of its said order until further order of the Court.

7. That because of the time limitations as hereinbefore set out an emergency exists which requires an immediate ruling by a Judge of this Court without the reconvening of the three-judge panel.

8. In the event the Court cannot act on this motion, conflict, [sic] and without the necessity of reconvening the three-judge panel, an emergency exists for the entry of a stay order staying the effective date for the operation of the order of this Court on September 28, 1972.

WHEREFORE, the defendants respectfully pray that this Court modify its order or in the alternative clarify its order to enable said defendants to inquire into the validity of the signatures of said petitions as they are required to do under Indiana law, and that the Court stay the effective date

of its said order until further order of the Court, and for all other necessary relief in the premises.

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[Verification Omitted]

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

-v-

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DE MOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLEE

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IN THE

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COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLEE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appeal in this case was timely filed.

2. Whether the requirement of Indiana law that a new political party file an affidavit that "it does not advocate the overthrow of local, state or national government by force or violence", is constitutional.

STATEMENT OF THE CASE

Indiana law requires that a group seeking a place on the ballot as a political party must file with the Election Board petitions bearing signatures of a prescribed number of registered voters along with a prescribed affidavit. The affidavit, signed by the officers of the party, must state that the party

> "does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." Indiana Code of 1971 (I.C. 1971), 3-1-11-12.

Appellants (hereafter referred to as the Communists) tendered petitions but failed to tender the required affidavit. The Election Board therefore refused to accept the petitions. The Communists then filed suit, alleging the unconstitutionality of the affidavit requirement, in the United States District Court for the Northern District of Indiana, Hammond Division. The Complaint was filed on August 30, 1972, and an amended complaint was filed on September 8, 1972.

A three-judge court was convened pursuant to 28 U.S.C. §§2281 and 2284. A hearing was held on September 28, 1972, at which this case was consolidated for hearing and decision with the suits of two other groups which had been denied a place on the ballot for noncompliance with the affidavit requirement. These groups are the Indiana Peace and Freedom Party and the Indiana American Independent Party, Inc.

The District Court's Memorandum and Order was handed down that same day. The affidavit requirement

was held to be severable. The first portion, providing "that it does not advocate the overthrow of local, state or national government by force or violence," was held constitutional, while the remainder was held unconstitutional. The Election Board was ordered to accept from the Communists an affidavit meeting the requirements of the part of the statute held constitutional at any time prior to 2:00 P.M. on September 29, 1972. (Jur.Stat. pp. 2a-4a.) The Election Board, on September 29, 1972, presented a Verified Motion to Reconsider and for Stay to one of the judges of the three-judge District Court. The Motion was based on the failure of the District Court to consider, or to allow the Election Board to consider, the sufficiency of the signatures on the petitions. That Motion was then file-marked October 3, 1972.

An affidavit was filed by the Communists, but it was rejected as not in proper form because it attached a limiting definition on the term "advocate," (Jur.Stat. p. 8a) other than that prescribed by law or required by the three-judge panel. The Communists then filed with the District Court a Petition for Mandate to Enforce the Prior Order of the Court. That petition was denied on October 4, 1972, the District Court holding that the "Election Board acted in accordance with the precise wording of this court's order." (Jur.Stat. p. 5a.)

On October 10, 1972, the Communists filed both a Notice of Appeal and a Motion to Amend. (App. pp. 36-38.) On October 17, 1972, they filed a Motion to Withdraw Notice of Appeal. (App. p. 39.) On October 31, 1972, the District Court granted the Motion to Withdraw and denied the Motion to Amend. (Jur.Stat. p. 6a.) The Communists then filed a second Notice of Appeal on November 29, 1972. (Jur.Stat. p. 7a.)

SUMMARY OF ARGUMENT

The first Notice of Appeal filed by the Communists divested the District Court of jurisdiction over this cause. A simultaneous Motion to Amend destroyed the finality of the judgment so as to preclude an appeal. Logically, the result of the simultaneous filing of those pleadings is to declare both to be nullities.

A state has an interest in the protection of its political processes from fraudulent candidacies, and it is fraudulent for a group seeking the violent overthrow of democratic government to disguise itself as a legitimate political party. Loyalty oaths have never been held unconstitutional *per se*.

The Indiana statute is not vague or overbroad. The Communists attempt to limit the scope of a proper statute to overly narrow bounds to fit their views.

An alternate ground of decision would be the Communist Control Act of 1954 which further shows the fraudulent nature of the Communists' claim to be a political party.

ARGUMENT

I

TIMELINESS OF THE APPEAL

The Communists' argument as to the timeliness of the appeal concurs in the Election Board's position that this issue involves a complex factual situation and a lack of clear legal precedent. The cases relied upon in the Brief of Appellants are not on point. *Bowman v. Loperena,* 311 U.S. 262 (1940), would appear no longer to be an accurate statement of the law, since it predated the 1946 amendment to Fed. R. Civ. Pro., Rule 6(b), which amendment precluded the trial courts from granting an extension of time for filing a petition under Fed. R. Civ. Pro., Rules 52 and 59. Thus, the timeliness of the petition for rehearing was not a jurisdictional requirement at that time. See 5A *Moore's Federal Practice,* §52.11[3] at p. 2757.

Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) and *Wolfsohn v. Hankin,* 376 U.S. 203 (1964), are not on point. In each of those cases, the District Court took affirmative action which led the appellant to believe that his appeal would be timely. Here, the District Court merely denied without comment the Motion to Amend. That ruling may have been on the merits, but may also have been on the ground that the Motion was not properly filed. Such silence cannot be equated with the affirmative action in *Thompson* and *Wolfsohn.* Four Justices dissented in *Wolfsohn* on the basis that the case relied upon for authority in *Thompson* should be narrowly limited to its facts.

The other point as to this issue which requires comment is the effect of the Election Board's Verified Motion to Reconsider and for Stay, which was denied by the District court on October 4, 1972. That Motion is argued by the Communists to have been a Rule 52 and 59 motion, although no rule was cited in the text of the Verified Motion.

The time limitations involved must be considered. The District Court Memorandum and Order of September 28, 1972, allowed the Communists until 2:00 on September 29, 1972, to file a proper affidavit. The time limit for printing absentee ballots necessitated an immediate decision of the Election Board, which was to meet that afternoon. It was anticipated that an Emergency Application for Stay of Order would have to be filed with this Court, and such a pleading was actually filed. See *Whitcomb v. Communist Party*, — U.S. —, 93 S.Ct. 28 (No. A 370, 1972). That pleading, which was intended as a Motion for Stay, was of necessity drafted in approximately thirty minutes by three attorneys alternately dictating to a secretary. Some confusion would necessarily result from such a proceeding.

The Election Board's Motion to Dismiss presents to the court the question, apparently of first impression, of whether a pleading filed by a party is of any effect when an inconsistent pleading is filed simultaneously. The Notice of Appeal divested the District Court of jurisdiction over the cause. The Motion to Amend destroyed the finality of the judgment so as to preclude an appeal. The most logical result of such a situation is to declare both such pleadings to be nullities.

II

CONSTITUTIONALITY OF THE STATUTE

The Indiana Statute which is being challenged as unconstitutional is IC 1971, 3-1-11-12. The District Court found the "loyalty oath" provision therein to be severable and constitutional in part. That portion which was upheld requires that a group seeking a place on the ballot as a political party must file with the Election Board an affidavit, signed by the officers of the prospective party, that the party

> "does not advocate the overthrow of local, state or national government by force or violence."

The Communists contend that the requirement of a loyalty oath for placement on the ballot is unconstitutional *per se* in that everybody has a constitutional right to placement on the ballot. This court has noted, however, that:

> ". . . a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or *fraudulent* candidacies. *Jenness v. Fortson,* 403 U.S., at 442, 91 S.Ct. at 1976." *Bullock v. Carter,* 405 U.S. 134 at 147 (1972). (Emphasis added.)

It is fraudulent for a group seeking by violent revolution to overthrow our democratic form of government to disguise itself as a political party and use the very forms of the democracy it seeks to subvert in order to gain support and carry on its nefarious ends.

While this Court has considered many cases involving loyalty oaths and has held many of the particular statutes to be unconstitutional, never has this court held all loyalty oaths to be unconstitutional *per se.* Rather, this Court

has noted that a proper loyalty oath is a valid exercise of state authority. See *Lisker v. Kelley*, 315 F.Supp. 777 at 782 (M.D.Pa. 1970), affirmed 401 U.S. 928 (1971). It might be noted that *Lisker* and the case of *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951), cited in *Lisker*, were cases upholding loyalty oaths required of political candidates.

The Communists contend that no oath beyond that of a successful candidate upon assuming office may be required. They also seek to differentiate between "positive" and "negative" oaths, whatever that distinction might be. Both of those arguments must fall in light of the decision of this Court in *Cole v. Richardson*, 405 U.S. 676 (1972). The oath under consideration there had two parts. The first was a requirement to uphold and defend the Constitution. That requirement was upheld as clearly analogous to oaths required by the Constitution itself.

The second part was a requirement to "oppose the overthrow of the government of the United States or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." That clause was also upheld for the reason that it was merely the converse of the first and did not expand the obligation of the oath. It was pointed out that the oath did not require any affirmative action, but dealt with a state of mind. A part of the requirement to uphold and defend the Constitution is the requirement of opposing its overthrow by force or violence.

The issue which is then presented by this case is whether one may advocate that which he has the constitutional duty to oppose! It may be that, by means of some "verbal calisthenics" such a result may be reached, but this Court in *Cole v. Richardson* rejected such antics.

The Communists attack the Indiana statute as vague and overbroad. That attack centers upon the word "advocate," claiming the statute thereby proscribes protected speech. *Cole v. Richardson* also dealt with that issue. The emphasis of the Court there was not on any dictionary definitions of specific words, but on the tenor and intent of the language as a whole.

> "But such a literal approach to the second clause is inconsistent with the Court's approach to the 'support oaths.' * * * As Mr. Justice Harlan noted in his separate opinion in our earlier consideration of this case, '. . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scapel. [But such an approach] amounts to little more than verbal calisthenics.' " 92 S.Ct. at 1337.

The applicable standard is that of fair notice. *American Communication Association v. Douds,* 339 U.S. 382, 412 (1950). Such fair notice does not require absolute precision or that there be no possibility of misunderstanding.

> "The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
> This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. *Roth v. U.S.,* 354 U.S. 476, 491 (1957). See also *Miller v. California,* — U.S. —, 41 Law Week 4925 at 4929, fn. 10 (1973).

The term "advocate" does not include mere abstract speculation. The meaning of language in the statute should further be considered in light of past decisions of the Indiana courts in which the term has been in issue. The term "advocate" was considered by the Supreme Court of Indiana in *Butash v. State,* 212 Ind. 492 (1937). In that case a conviction for "advocating" and "inciting" the

overthrow of government was reversed on the grounds that the statements made were merely an expression of opinion or the suggestion of a possible remedy for a postulated problem.

> "Nowhere did he plead for the adoption of his theory, or defend them by argument. . . ." 212 Ind. at 498.

The Communists further seek to limit the term "advocate" to the scope allowable in criminal cases. Such a standard has been held inapplicable to a merely regulatory civil statute in *Communist Party v. Control Board,* 367 U.S. 1 at 56 (1961). Thus, the scope of regulation may vary with the nature of the statute involved. It would further be noted that the affidavit required under the statute refers to the official actions of the party itself thus reducing to a minimum any possibility of "innocent involvement" in activities which might be considered advocacy.

A final consideration is the provision of the Communist Control Act of 1954 which states that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . ." 50 U.S.C. §842.

This statute is presented in support of the Election Board's position that the claim of the Communists to be a legitimate political party is fraudulent.

The statute would have to be considered an alternate basis of decision, since it is apparent that the District

Court did not rely on the statute in its opinion. Reliance on the statute would have precluded allowing the Communists to file an affidavit on September 29. (See Jur. Stat., p. 3a.)

The Communist Control Act was based upon a factual finding in the Subversive Activities Control Act of 1950 that the Communists were then engaged in illicit attempts to overthrow democracy, which situation was found still to exist six years later. *Communist Party v. Control Board, supra,* at pp. 4, 21 and 88. It may logically be inferred, at least in the absence of any showing to the contrary, that a state of facts which has existed for such a long period of time will continue indefinitely. The refusal of the Communists to file a proper affidavit that they do not advocate such unlawful activity would show that the situation today is still the same as when the Communist Control Act and Subversive Activities Control Act were passed.

The Communists argue that the Communist Control Act is a bill of attainder, citing *Blawis v. Bolin,* 41 Law Week 2617 (D. Ariz., 1973). In that case, though, part of the language of the statute, to-wit: "whose object or purpose is to overthrow the Government of the United States, or the government of any state . . . therein by force and violence," was omitted. The proper application of the statute, as shown in its application to the facts of this case herein, makes it clearly constitutional. Therefore, the Communist Control Act is a proper correlative of I.C. 1971, 3-1-11-12 and shows the necessity and propriety of the Indiana statute.

CONCLUSION

For the foregoing reasons, the Indiana State Election Board urges this Court to affirm the decision of the United States District Court for the Northern District of Indiana.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

vs.

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DE MOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

PETITION FOR REHEARING

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

PETITION FOR REHEARING

The appellees, by counsel, respectfully petition this Court to grant a rehearing in this cause and reconsider its opinion therein of January 9, 1974.

As a result of the opinion of the Court, appellees (hereafter, the State) are unable to determine what loyalty oath, if any, may be required of a group seeking

certification as a political party under Indiana law or under what circumstances, if any, such a loyalty oath may be required. It is respectfully submitted that the opinion of the Court in this case, when considered together with prior decisions of this Court, has created confusion and uncertainty in the law.

In the past, this Court had treated in separate lines of authority those loyalty oath cases involving "advocacy oaths" and those involving "support oaths." See, e.g. *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 at 161-164 (1971). The case of *Cole v. Richardson,* 405 U.S. 676 (1972), however, showed that distinction to be artificial. A loyalty oath requiring opposition to the unlawful overthrow of government was considered to be merely the converse of a support oath, as it certainly is. Yet such an oath is equally clearly the converse of an advocacy oath.

The State attempted in this appeal to obtain a clarification of whether these two types of oath were now to be considered one. The opinion of the Court in this case did not provide that clarification; rather, it merged two other lines of case authority, distinguishing criminal and civil cases. Here a clearly civil case, involving access to the ballot, was decided as if it were a criminal case. Such a decision is contrary to the prior rule of this Court as set out in *Communist Party v. Control Board,* 367 U.S. 1 at 56 (1961).

Thus, in this case there are four separate lines of authority converging at one point and creating new and undetermined interrelationships. If the criminal law standard is now to apply to support oaths, as appears

likely to the State, then it would be doubtful if any loyalty oath statute could ever be constitutional. As an extreme case, it would then appear that the oath set out for the office of President of the United States by Article 2, § 1 (8) of the United States Constitution could be required only if the text of the inaugural address "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Slip opinion, p. 7, citing *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

It is not believed by the State that any such result was actually intended. The uncertainty caused by the opinion of the Court in this case, however, necessarily results in such speculation.

The State would further submit that the concurring opinion of Mr. Justice Powell in this case would appear to rest upon an interpretation of an Indiana law which has not been previously construed, was not in issue below and would, in all probability, be construed differently by the courts of the State of Indiana. The State submits that there was no improper discrimination in the case.

The relevant provisions of Indiana Code of 1971, 3-1-11-12 are as follows:

> "*Any political party* or organization which is in existence at the time of the passage of this act [1945], or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, *shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act.* No existing or newly-organized political party or organization shall be permitted on or have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under

> **oath, that it does not advocate the overthrow of local, state or national government by force or violence . . .'' (emphasis added)**

Following the interpretation of this statute generally accepted by all the concerned parties, the Republican Party and the Democratic Party inserted the appropriate plank in their platforms, but did not file an affidavit. Each of these parties had polled more than ten percent of the vote in the last preceding general election. Therefore, they were entitled to a place on the ballot without qualifying anew. I.C. 1971, 3-1-11-1. They were also subject to the primary election and state convention provisions discussed below.

Four other parties appeared on the 1972 ballot, each by the petition provisions of I.C. 1971, 3-1-11-1. These parties did not qualify for inclusion on the ballot by reason of prior election results. The Socialist Labor Party and the Socialist Workers Party filed in a timely manner the required petitions and affidavit. The Indiana Peace and Freedom Party and the American Independent Party initially filed faulty affidavits, but were allowed to file proper affidavits as a result of the litigation in the District Court.

The Communist Party, appellant herein, initially attempted to file its petitions without any affidavit. After the litigation in the District Court, they attempted to file a modified affidavit which was held by the Election Board and the District Court not to comply with the statutory requirements still in effect at that time.

The concurring justices consider the affidavit requirement to apply to parties using the primary election and convention processes. IC 1971, 3-1-9-1. While such an interpretation might seem likely to one not familiar with

Indiana election laws, that law in its entirety shows the contrary to be true.

I.C. 1971, 3-1-9-1 provides that the procedure set out in 3-1-9-1 through 3-1-10-5 is mandatory for parties having polled more than ten percent of the vote in the last preceding general election. Under this procedure, a party primary is held at which candidates for certain offices, precinct committeemen of the party and delegates to the state convention are selected. I.C. 1971, 3-1-9-4. Within sixty days thereafter, that party must hold a state convention 3-1-10-1. That convention nominates candidates for state-wide offices. "Such convention shall also formulate its party platform." I.C. 1971, 3-1-10-3.

That platform then becomes the official guide of the positions of the party. Such status is given by the fact that it is the agreed statement of the official delegates of the party as selected by the rank and file voters of the party in an open party primary.

Were the officers of the party to be required to file an affidavit as to the position of the party, those officers would necessarily be bound by the provisions of the platform, so that the affidavit would be pure surplusage. The only possible effect of such a requirement would be to eliminate a party from the ballot for a technical error in following the procedure to be set down. [The Supreme Court of Indiana has ruled that any affidavit filed must comply strictly with the statutory language. *State ex rel Socialist Labor Party v. State Election Board,* 251 Ind. 260 (1968)]. Such a result would be totally absurd since, again, that affidavit would be only a secondary authority of the position of the party.

Other parties, including those which had not presented candidates in the last preceding general election or had

received less than ten percent of the total vote in that election, must follow a different procedure. There is no provision of law authorizing such parties to participate in a primary election nor to hold a state convention. Such parties are left to their own devices by Indiana law. As a practical matter, such organizations are usually led by a fairly small group of persons, choosing their officers and candidates in an informal caucus. For such a party, the affidavit of the party officers is a practical and necessary device for determining the positions held by the party.

It is respectfully submitted that the concurring justices erred in assuming that differences in treatment constituted discriminatory treatment. Rather, that difference represents a difference in the underlying facts. Were the parties holding conventions to be required to file an affidavit in addition, then there would be discrimination.

It thus appears that the two sentences from I.C. 1971, 3-1-11-12, quoted above are alternative rather than cumulative requirements. Any other interpretation would be unreasonable, and Indiana law recognizes that:

> "In construing this or any other statute, this court shall endeavor to do so within the context of logic and reason. As we have stated on past occasions: 'It is presumed that the Legislature does not intend an absurdity, and such a result will be avoided if the terms of the act admit of it by a reasonable construction.' " *In re Estate of Pickens v. Pickens,* 255 Ind. 119 at 128 (1970).

It should further be noted that the interpretation of the requirements of 3-1-11-12 as in the alternative has been consistently followed by the Indiana Election Board and the various political parties, in which members of the Legislature play leading roles, for nearly thirty years.

Indiana law further provides that when an administrative or executive interpretation is placed on a statute which is acquiesced in by those concerned, that interpretation will not be disturbed. *State Board of Tax Commissioners v. Wright,* 139 Ind. App. 370 (1966); *Baker v. Compton,* 247 Ind. 39 (1965).

It is therefore submitted that the concurring justices misconstrued provisions of Indiana law and that a decision on the merits by those justices would be proper.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to grant a rehearing and reconsider its opinion entered herein on January 9, 1974.

Respectfully submitted,

/s/ THEODORE L. SENDAK

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Attorney General of Indiana

/s/ DARREL K. DIAMOND

DARREL K. DIAMOND
Assistant Attorney General

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

/s/ THEODORE L. SENDAK

THEODORE L. SENDAK
Attorney General of Indiana

/s/ DARREL K. DIAMOND

DARREL K. DIAMOND
Assistant Attorney General

Syllabus

COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

No. 72–1040. Argued October 16, 1973—Decided January 9, 1974

The application of appellants (the Communist Party of Indiana, certain of its officers and potential voters, and its candidates for President and Vice President) for a place on the Indiana ballot for the 1972 general election was rejected for failure to submit a statutory loyalty oath stating that the Party "does not advocate the overthrow of local, state or national government by force or violence." Appellants, contending that the statute was unconstitutional, thereupon filed this action in the District Court for injunctive and declaratory relief. On September 28, 1972, a three-judge court declared the statute constitutional and ordered the Election Board to place the Party on the ballot, but only if the required oath was submitted. After a qualified oath submitted by the Party was rejected, appellants on October 3 sought a District Court order directing the Board to accept such oath, and on the same day the Board requested reconsideration of the September 28 order. The next day the District Court denied both motions. On October 10 appellants filed a notice of appeal to this Court, which it later sought to withdraw so that the District Court might act on appellants' motion of the same day that the September 28 order be amended in certain respects. On October 31, the District Court allowed withdrawal of the appeal notice but denied the motion to amend. Appellants refiled their notice of appeal to this Court on November 29, which appellees contend is untimely. *Held:*

1. Appellants' notice of appeal was within the 60-day appeal period prescribed by 28 U. S. C. § 2101 (b), since appellees' October 3 motion for reconsideration suspended the finality of the September 28 judgment until the District Court's denial of such motion on October 4 restored it, so that the time for appeal thus began to run from October 4. Pp. 445–446.

2. The loyalty oath requirement of the Indiana statute violates the First and Fourteenth Amendments. Pp. 446–450.

(a) The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action, applies to state regulation burdening access to the ballot, rights of association in the political party of one's choice, casting an effective ballot, and in running for office, which are interests as substantial as those in other areas that this Court has protected against statutory schemes contrary to the First and Fourteenth Amendments. Pp. 448–449.

(b) For purposes of determining whether to grant a place on the ballot, a group advocating violent overthrow as abstract doctrine need not be regarded as necessarily advocating unlawful action. Pp. 449–450.

Reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed an opinion concurring in the result, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 451.

Sanford Jay Rosen argued the cause for appellants. With him on the brief was *Melvin L. Wulf*.

Theodore L. Sendak, Attorney General of Indiana, argued the cause for appellees. With him on the brief were *Darrel K. Diamond*, Assistant Attorney General, and *A. Frank Gleaves III*, Deputy Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a loyalty oath case. The question for decision is whether the First and Fourteenth Amendments are violated by Indiana's requirement, Ind. Ann. Stat. § 29–3812 (1969), that "[n]o existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the over-

throw of local, state or national government by force or violence . . . ." [1]

Appellants are the Communist Party of Indiana, a new political party in Indiana, certain of its officers and potential voters, and its candidates for President and Vice President in the 1972 election. Appellees are the Indiana State Election Board and its members. When appellants applied to the Election Board in August 1972 for a place on Indiana's National Ballot for the 1972 general election without submitting the required oath, the Board, on the advice of the Attorney General of Indiana, rejected the application. Appellants thereupon filed this action in the District Court for the Northern District of Indiana seeking a declaration of the uncon-

[1] Section 29–3812 reads in pertinent part as follows:

"No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act . . . or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear."

stitutionality of § 29–3812, and an injunction requiring that the Election Board place the Party on the ballot. A three-judge court was convened and that court, on September 28, 1972, in an unreported opinion, declared the provision of § 29–3812 that is challenged on this appeal constitutional and issued an order requiring the Election Board to place the Communist Party and its nominees on the National Ballot only "[i]n the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order. . . ."[2] The Communist Party submitted an affidavit that, in addition to the statutory language, added the following:

> "The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U. S. 298 at 320, 'the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action.'"

The Election Board rejected the affidavit and appellants, on October 3, returned to the District Court, seeking an order directing the Board to accept it. On the same day,

[2] The District Court's decision of September 28 also decided attacks upon the loyalty oath provision of § 29–3812 made in actions brought by two other new political parties, the American Independent Party and the Indiana Peace and Freedom Party. All three actions challenged, in addition to the "advocacy" provision, the provision of § 29–3812 requiring a party also to file an affidavit that "it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." The September 28 memorandum of the three-judge court declared this provision of § 29–3812 unconstitutional. The American Independent Party and the Indiana Peace and Freedom Party then filed affidavits accepted by the Election Board and were placed on the National Ballot for the 1972 elections. On November 11, the Election Board appealed that portion of the order to this Court. We summarily affirmed. *Whitcomb* v. *Communist Party*, 410 U. S. 976 (1973).

the Election Board filed a motion requesting reconsideration of the order of September 28.[3] The District Court, on October 4, denied both motions by order entered that day. Appellants on October 10 filed a notice of appeal to this Court to enable them to seek emergency relief. That effort was abandoned, and appellants then sought leave of the District Court to withdraw the notice of appeal in order that the District Court might act on a motion of appellants, also filed October 10, that the District Court amend its September 28 order to include a determination that § 29–3812 was constitutional "only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine." On October 31, the District Court entered an order granting leave to withdraw the notice of appeal of October 10 but denying the motion to amend the September 28 memorandum.

Appellants refiled their notice of appeal on November 29. Appellees moved to dismiss the appeal as jurisdictionally untimely, arguing that the 60-day period for appeal, 28 U. S. C. § 2101 (b), expired on November 27. We postponed consideration of the question of our jurisdiction to the merits. 410 U. S. 981 (1973). We hold that the appeal was timely. Appellees' motion for reconsideration of October 3 suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it. Time

[3] Section 29–3801 provides for ballot listing of any party that files petitions containing signatures of one-half of one percent "of the total vote of all parties cast in the state for secretary of state at the last preceding general election." The sufficiency of the Communist Party petitions in this respect was challenged by appellees in the District Court but was not discussed in the court's September 28 memorandum although the issuance of the injunction presupposed a decision adverse to appellees. The motion for reconsideration requested the court to reconsider that result.

for appeal thus began to run from October 4 and the notice of appeal filed November 29 was timely.[4] As to the merits, we hold that the loyalty oath requirement of § 29–3812 violates the First and Fourteenth Amendments,[5] and therefore reverse the judgment of the District Court.[6]

---

[4] Appellees also argue that the notice of appeal of November 29 was ineffective because the earlier notice of October 10 divested the District Court of jurisdiction and that that jurisdiction could not have been revested by the granting of leave to withdraw the October 10 notice. But since the October 10 notice was clearly timely, that argument is reduced to an attack on the untimeliness under Supreme Court Rule 13 (1) of the filing of the jurisdictional statement on January 26, 1973. Timely docketing of the jurisdictional statement is not, however, a jurisdictional requisite. *Johnson* v. *Florida*, 391 U. S. 596, 598 (1968).

Appellees' brief also invokes § 3 of the Communist Control Act of 1954, 68 Stat. 776, 50 U. S. C. § 842, providing that "The Communist Party of the United States . . . [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . ." We have difficulty understanding appellees' argument that this statute is applicable to the Communist Party of Indiana or in any way relevant to the issues in this case. The statute was not relied upon by either the Election Board, or the District Court when it denied declaratory relief. In any event, insofar as the argument is that this statute bars the Communist Party of Indiana from maintaining this action, it is rejected. See *Communist Party, U. S. A.* v. *Catherwood*, 367 U. S. 389 (1961).

[5] Appellants also contend that the requirement is constitutionally precluded as an oath different from that prescribed for a President by Art. II, § 1, and for any other state or federal officer by Art. VI, cl. 3. See *Cole* v. *Richardson*, 405 U. S. 676 (1972). In view of our result we need not address those contentions.

[6] The only question presented in the jurisdictional statement is whether § 29–3812 is facially valid. Thus, we do not reach the question whether the Election Board's apparent failure to require the Republican and Democratic Parties, the two major parties in Indiana, to comply with the statute rises to the level of a denial of equal protection of the law *as applied*, or was within the Board's

Loyalty oath cases are not strangers to this Court, see Note, Loyalty Oaths, 77 Yale L. J. 739 (1968), but the constitutional questions presented in earlier cases arising from their use to limit access to the ballot have not had plenary consideration.[7] The District Court decided this case under the pressure of a ballot printing deadline, and its memorandum opinion states no reasons and cites no authorities to support the court's holding that "that portion of the statute providing 'that it does not advocate the overthrow of local, state or national government by force or violence,' is constitutional and hence enforceable by Indiana."

Appellees do not deny that § 29–3812 exacts a broad oath embracing advocacy of abstract doctrine as well as advocacy of action. Yet this Court has held in many contexts that the First and Fourteenth Amendments render invalid statutes regulating advocacy that are not limited to advocacy of action. And, as we have so often emphasized, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

We most recently summarized the constitutional prin-

"prosecutorial discretion." We note, however, that the only relevant testimony in the District Court, given by the Board's clerk, is entirely silent as to the reasons behind the omission.

[7] *E. g.*, *Lisker* v. *Kelley*, 401 U. S. 928 (1971), summarily aff'g 315 F. Supp. 777 (1970); *Gerende* v. *Board of Supervisors*, 341 U. S. 56 (1951), presenting a constitutional challenge to a Maryland statute imposing a loyalty requirement on candidates for municipal office rested on "the narrowing construction tendered by the Attorney General [of Maryland] during oral argument so as to avoid the constitutional issue that was argued." *Whitehill* v. *Elkins*, 389 U. S. 54, 58 (1967). And *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583 (1972), was dismissed as insufficiently concrete and mature to permit adjudication, on the authority of *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947).

ciples that have evolved in this area in *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969). We expressly overruled the earlier holding of *Whitney* v. *California*, 274 U. S. 357 (1927), that "without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." 395 U. S., at 447. For, we said:

> "[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957) . . . ." *Id.*, at 447–448.

This principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" has been applied not only to statutes that directly forbid or proscribe advocacy, see *Scales* v. *United States*, 367 U. S. 203 (1961); *Noto* v. *United States*, 367 U. S. 290 (1961); *Yates* v. *United States*,

354 U. S. 298 (1957); but also to regulatory schemes that determine eligibility for public employment, *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); see also *United States* v. *Robel*, 389 U. S. 258 (1967); tax exemptions, *Speiser* v. *Randall*, 357 U. S. 513 (1958); and moral fitness justifying disbarment, *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957).

Appellees argue that the principle should nevertheless not obtain in cases of state regulation of access to the ballot. We perceive no reason to make an exception, and appellees suggest none. Indeed, all of the reasons for application of the principle in the other contexts are equally applicable here. "To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper* v. *Pontikes*, *ante*, at 57 (footnote omitted). At stake are appellants' First and Fourteenth Amendment rights to associate with others for the common advancement of political beliefs and ideas. "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Ibid.*; *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). At stake as well are appellants' interests as party members in casting an effective ballot. See *Bullock* v. *Carter*, 405 U. S. 134, 142–144 (1972).

Thus, burdening access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the Party urges others "to *do* something, now or in the future . . . [but] . . . merely to *believe* in something," *Yates* v. *United States*, *supra*, at 325, is to

infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law. For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964).

Appellees argue: "It is fraudulent for a group seeking by violent revolution to overthrow our democratic form of government to disguise itself as a political party and use the very forms of the democracy it seeks to subvert in order to gain support and carry on its nefarious ends." Brief for Appellees 7. Again, they argue "that the affidavit required under the statute refers to the official actions of the party itself, thus reducing to a minimum any possibility of 'innocent involvement' in activities which might be considered advocacy." *Id.*, at 10. As we understand appellees, this is an argument that, at least for purposes of determining whether to grant a place on the ballot, any group that advocates violent overthrow as abstract doctrine must be regarded as necessarily advocating unlawful action. We reject that proposition. Its acceptance would only return the law to the "thoroughly discredited" regime of *Whitney* v. *California*, 274 U. S. 357 (1927), unanimously overruled by the Court in *Brandenburg* v. *Ohio*, 395 U. S., at 447, 449.[8]

Reversed.

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[8] Cf. *Noto* v. *United States*, 367 U. S. 290, 298 (1961), a prosecution under the Smith Act, 18 U. S. C. § 2385, where we held that the constitutional limitations require that criminal advocacy by the Communist Party be proved by "some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in the result.

I concur in the result. In my view it was quite unnecessary to reach the issue addressed by the Court.

It was established at trial that appellees had certified the Democratic and Republican Parties despite the failure of party officials to submit the prescribed affidavits under Ind. Ann. Stat. § 29–3812 (1969).[1] In *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), this Court held that a discriminatory preference for established parties under a State's electoral system can be justified only by a "compelling state interest." In the present case, no colorable justification has been offered for placing on appellants burdens not imposed on the two established

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fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." See also *Scales* v. *United States*, 367 U. S. 203 (1961); *Yates* v. *United States*, 354 U. S. 298 (1957).

[1] The complaint in this case expressly alleged that § 29–3812 subjected appellants to burdens not imposed on the Republican and Democratic Parties, and proof at trial was directed to that issue. The Court now maintains that this issue cannot be considered because it was not expressly raised in the jurisdictional statement. *Ante*, at 446–447, n. 6. Supreme Court Rule 15 (1) (c) provides, however, that the jurisdictional statement "will be deemed to include every subsidiary question fairly comprised therein" and that "questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The issue of discriminatory application of the statute certainly falls within the gravamen of appellants' jurisdictional statement and should therefore be considered. See, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 371–372 n. 4 (1967). Moreover, the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief. This consideration applies even though such grounds are not raised in the jurisdictional submissions. *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960). Cf. *Barr* v. *Matteo*, 355 U. S. 171, 172 (1957).

parties.[2] It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment.[3]

[2] The Court's intimation that a prima facie case of constitutional deprivation was not established because Board officials were "silent as to the reasons behind the omission" of the established parties from the affidavit requirement (*ante*, at 447 n. 6) misses the point. Nothing more need be shown than that the statute was in fact discriminatorily applied. It is the Board officials, not the appellants, who must then come forth with reasons justifying the discriminatory application of the statute.

[3] In view of this patently unconstitutional application of the statute, there is no occasion to reach the broader issue addressed by the Court today. Although I express no conclusion on that issue, it should be noted that this is the first case touching upon the type of oath which may be required of a candidate for the office of President of the United States. The Indiana oath, of course, is required of the party rather than its presidential candidate. But it could be argued that *Yates* v. *United States*, 354 U. S. 298 (1957), and its progeny are not controlling here. Under Art. VI, cl. 3, all state and federal officers are bound by oath "to support this Constitution," and under Art. II, § 1, cl. 8, the President must swear that he will "faithfully execute the Office . . . and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 3, also imposes on the President the affirmative duty to "take Care that the Laws be faithfully executed." Neither the effect of these explicit constitutional obligations nor the responsibility of a chief executive official of government to enforce the rule of law was a relevant issue in any of the *Yates* line of cases. Cf. *Cole* v. *Richardson*, 405 U. S. 676 (1972).